Supreme Court, U. S.
FILED
JUN 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY
and CHRISTIANA SECURITIES COMPANY,
Petitioners,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DANIEL M. GRIBBON
CYRIL V. SMITH, JR.
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006
Attorneys for Petitioner
E. I. du Pont de Nemours & Company
MATTHEW J. BRODERICK
RICHARD S. SELTZER
EDWARD J. McINTYRE
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, Pa. 19102
Attorneys for Petitioner
Christiana Securities Company

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. The Court of Appeals erred in rejecting the Commission's determination that the net asset value of an investment company, rather than the market value of its stock, should be the basis for merger terms	9
II. The Court of Appeals exceeded its review authority in requiring that any tax savings by Christiana or its stockholders be shared with Du Pont	14
III. The Court of Appeals departed from the accepted and usual course of appellate procedure	17
CONCLUSION	18
APPENDIX	1a

TABLE OF AUTHORITIES

Camp v. *Pitts*, 411 U.S. 138 (1973) 17

Federal Power Commission v. *Transcontinental Gas Pipe Line Corp.*, —— U.S. ——, 44 U.S.L.W. 3413 (U.S. Jan. 19, 1976) 17-18

Harriman, et al. v. *E. I. du Pont de Nemours and Co., et al.*, Civil Action No. 4721 (D. Del. Dec. 23, 1975) (CCH FED. SEC. L. REP. ¶ 95,386) 8

La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) .. 17

Niagara Hudson Power Corp. v. *Leventritt*, 340 U.S. 336 (1951) 8, 12, 13

Page

Securities and Exchange Commission v. *Chenery Corp.*,
332 U.S. 194 (1947) 8, 10, 11

STATUTES AND RULES

Investment Company Act of 1940
15 U.S.C. § 80a-2(a)(41) 9-10
15 U.S.C. § 80a-17 ..... 2, 5
15 U.S.C. § 80a-42 ..... 7, 17
15 U.S.C. § 80a-43 ..... 2, 3

Public Utility Holding Company Act
15 U.S.C. § 79k 12

Securities Exchange Act of 1934
15 U.S.C. § 78j(b) 8

Treasury Regulation, § 20.2031-1(b) 12

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2111a(a) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

E. I. DU PONT DE NEMOURS AND COMPANY
and CHRISTIANA SECURITIES COMPANY,
Petitioners,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners E. I. du Pont de Nemours and Company ("Du Pont") and Christiana Securities Company ("Christiana") pray that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Eighth Circuit reversing a determination by the Securities and Exchange Commission ("Commission") under the Investment Company Act of 1940 that the terms of a proposed merger between Christiana and Du Pont are fair and reasonable.

OPINION BELOW

The opinion and order of the Commission, the majority and dissenting opinions of the Court of Appeals, and the order of the Court of Appeals denying, by an equally divided vote, petitions for rehearing and suggestions for rehearing in banc are set out in the Appendix to the petition for a writ of certiorari that has been filed this day by the Securities and Exchange Commission ("SEC Petition").

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1976. On February 26, 1976, the Court of Appeals denied timely motions for rehearing. On May 15, 1976, the Commission and the Petitioners were granted, in an order by Mr. Justice Blackmun, an extension of time to file petitions for writs of certiorari until June 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether, in setting aside the determination of the Commission that the terms on which Du Pont and Christiana propose to merge are fair and reasonable and involve no overreaching, and thus meet the standard of Section 17 of the Investment Company Act, the Court of Appeals was warranted in substituting its own views for the judgments of the Commission on securities valuation, fairness, overreaching and protection of investors.

STATUTE INVOLVED

Sections 17 and 43 of the Investment Company Act, 15 U.S.C. § 80a-17, 42, provide in pertinent part:

§ 17 (a) It shall be unlawful for any affiliated person or promoter of or principal underwriter for a registered investment company (other than a company of the character described in section 80a-12(d)(3)(A) and (B) of this title), or any affiliated person of such a person, promoter, or principal underwriter, acting as principal—

> (1) knowingly to sell any security or other property to such registered company or to any company controlled by such registered company, . . .

(b) Notwithstanding subsection (a) of this section, any person may file with the Commission an application for an order exempting a proposed transaction of the applicant from one or more provisions of said subsection. The Commission shall grant such application and issue such order of exemption if evidence establishes that—

> (1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;
>
> (2) the proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and reports filed under this subchapter; and
>
> (3) the proposed transaction is consistent with the general purposes of this subchapter.

§ 43 (a) Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty

days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such petition such court shall have the jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. * * *

STATEMENT OF THE CASE

This case arises out of a challenge by Respondents Murtaugh and Collins, stockholders of Du Pont, to an order of the Commission approving the terms of a proposed merger of Christiana, an investment company, into its affiliate, Du Pont. Certain transactions between investment companies and their affiliates, including mergers, which are viewed as a sale of property, are prohibited by the Investment Company Act unless the Commission finds that the proposed terms are fair and reasonable and do not involve overreaching on the part of any person concerned (15 U.S.C. § 80a-17).

Christiana owns approximately 28 percent of the outstanding Du Pont common stock. That holding, which had a market value of approximately $2 billion at the time the merger agreement was negotiated, represents over 98 percent of the total value of Christiana's assets.[1] The merger terms contemplate that Du Pont will retire all the Du Pont common stock presently held by Christiana and will issue for distribution to Christiana stockholders new Du Pont common stock. In substance, therefore, as the Commission recognized, the proposed merger involves an exchange of equivalents, Du Pont common stock for Du Pont common stock.

An application for approval of the merger terms under Section 17 of the Investment Company Act was filed with the Commission and notice of such application was sent by Christiana and Du Pont respectively to each of approximately 8,000 Christiana stockholders and 225,000 Du Pont stockholders. Five Du Pont stockholders requested a hearing which was subsequently held before an Administrative Law Judge and testimony was taken over a period of seven days.

---

[1] The balance of Christiana's assets at that time consisted of cash, a 3 percent interest in the Wilmington Trust Company, all of the stock of a newspaper, The News-Journal Company, and a small holding of Du Pont preferred stock which in the aggregate had an adjusted value (net of current liabilities) of some $26 million.

By agreement the matter was presented directly to the Commission and following briefs and oral argument the Commission, by unanimous vote, found the terms of the proposed merger to be fair and reaable and to involve no overreaching. Two stockholders of Du Pont, Murtaugh and Collins, sought judicial review of the Commission order.[2] The Court of Appeals set aside the Commission's order on the ground that the merger terms were unfair to Du Pont despite the fact that Du Pont would issue somewhat fewer shares of its own common stock than it would receive from Christiana for retirement and would, in addition, receive some $26 million in miscellaneous assets.[3] The majority opinion was written by Circuit Judge Heaney and joined in by Senior District Judge Smith, Eastern District of Michigan, sitting by designation. Circuit Judge Stephenson filed a dissenting opinion. An equally divided court denied petitions for rehearing with suggestions for rehearing in banc filed by the Commission and by Du Pont and Christiana.

---

[2] Section 43 of the Investment Company Act permits review by any Court of Appeals within whose jurisdiction a party resides. The Murtaugh petitions, originally filed in the Court of Appeals for the Seventh Circuit, were transferred to the Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 2111a(a) and consolidated with the Collins petition which had an earlier filing date.

[3] Du Pont would issue shares of its own common stock equal in value to 97.5 percent of the adjusted net asset value of all Christiana's assets. The resulting discount of 2.5 percent, representing a gain in equity and participation in earnings for non-Christiana shareholders of Du Pont, is larger than any discount previously approved by the Commission or found in any reported transaction. At the market value of Du Pont stock as of the date the merger terms were established, Du Pont would issue 188,500 fewer shares of common stock than it would receive from Christiana for retirement.

The Court of Appeals rejected the Commission's judgment in two principal respects. (1) It held that the Commission erred in finding that the merger terms should reflect the value of Christiana's assets, principally Du Pont common stock, rather than the market price of Christiana stock. (2) It also held, contrary to the Commission's view, that as a matter of law Du Pont should share in any tax "savings" to Christiana and its stockholders resulting from the elimination of the intercorporate dividend tax and the tax-free character of the proposed merger.

In its review of the Commission order, the Court of Appeals, after receiving briefs and hearing argument, employed Professor Roger B. Upson, Associate Dean of the University of Minnesota College of Business Administration, "to assist the Court in understanding the record in this case and to prepare reports and memoranda for this Court in connection with that function" (SEC Petition 91a, n.40). Aside from a report filed by Professor Upson on which the parties were accorded an opportunity for comment, it is not possible to assay his role in the Court's review of the Commision's decision. That report includes numerous data and observations that are not a matter of record, are not a proper subject of judicial notice and were, of course, at no time considered by the Commission which is charged by Congress with passing initially on all relevant evidence (15 U.S.C. § 80a-42).

One of the petitioners in the Court of Appeals, Murtaugh, brought a stockholder's derivative action claiming that the merger terms contravene Delaware state law and also constitute fraud and misrepresentation in violation of Section 10(b) of the Securities

Exchange Act of 1934, 15 U.S.C. §78j(b). Following a full evidentiary hearing, that challenge was rejected by the United States District Court for Delaware, *Harriman, et al.* v. *E. I. du Pont de Nemours and Co., et al.*, Civil Action No. 4721 (D. Del. Dec. 23, 1975) (CCH FED. SEC. L. REP. ¶95,386). In rejecting plaintiffs' state law and Section 10(b) contentions, the District Court took into account the Commission's determination under the Investment Company Act as shown in the excerpt from its opinion set forth in the Appendix.

REASONS FOR GRANTING THE WRIT

The Court of Appeals rejected the Commission's judgments on matters that are central to the administration not only of the Investment Company Act but of other federal regulatory measures in which valuation, fairness, overreaching and protection of investors are of critical significance. In substituting its own views for those of the Commission on these matters that are entrusted by Congress to the Commission's expertise, the Court of Appeals has decided an important federal question in a way that conflicts with applicable decisions of this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947) and *Niagara Hudson Power Corp.* v. *Leventritt*, 340 U.S. 336 (1951). These cases establish that it is the Commission and not the reviewing court that has the responsibility for ascertaining fairness in regulated securities transactions.

In addition, the manner in which the Court of Appeals considered and disposed of this matter is such a departure from accepted appellate procedure as to warrant the exercise of this Court's power of supervision. The Court of Appeals received off-the-record ex parte evidentiary assistance from an expert whose views were never considered by the Commission. Its decision was reached by a split vote, determined by an out-of-circuit Senior District Judge, that clearly warranted the in banc reconsideration voted by half the members of the court.

I. The Court of Appeals Erred in Rejecting the Commission's Determination that the Net Asset Value of an Investment Company, Rather than the Market Value of its Stock, Should be the Basis for Merger Terms.

The Commission found that the Investment Company Act, the intention of Congress in passing that Act, and the Commission's own consistent interpretation of the Act establish that the value of an investment company's assets rather than the price at which its common stock sells must determine the terms on which it may merge into an operating affiliate. In reaching its conclusion, the Commission carefully examined the economic factors that affect a closed-end investment company such as Christiana, and the nature of the interests of investors which are to be given significant weight. The solid support that these considerations give to the Commission's ultimate judgment is fully developed in the Commission's opinion and will not be repeated here. (SEC Petition 1a).

The Court of Appeals refused to accept the Commission's understanding of its own previous decisions, its reading of the Investment Company Act, and its ultimate judgment that the merger terms should re-

flect net asset value.[4] Even if this issue is viewed as one of first impression, as the Court of Appeals viewed it, the choice between market price and net asset value in determining proper treatment for investment company stockholders is certainly the kind of judgment that the Commission is best qualified to make and that is, under principles established by this Court, entitled to the greatest weight by appellate courts. In *Chenery* II, this Court reversed a decision by a Court of Appeals that had substituted its judgment for that of the Commission in the application of the "fair and equitable" test in reorganizations, a criterion strikingly similar to that applied by the Commission in this case. In so doing, this Court articulated the standard of review that should have been applied by the Court of Appeals in this case, but was not:

> "The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight

[4] Net asset value, for purposes of an investment company under the Act means the market value of such publicly traded securities which the investment company holds and the fair market value of its other assets less its liabilities. Section 2(a)(41) of the Act, 15 U.S.C. § 80a-2(a)(41). The record before the Commission includes a table that sets forth the salient details on ten mergers considered most closely comparable to the proposed merger of Christiana into Du Pont, six of which had required and received approval by the Commission. In each of the transactions the exchange ratio reflected net asset value; in none of them was the market price of the investment company stock, which was ordinarily significantly less than net asset value, considered determinative.

In addition, the record shows that three independent investment banking firms retained to advise the parties were each of the view that the merger terms should reflect net asset value and each found the terms agreed upon and submitted to the Commission for approval to be fair and reasonable: Morgan Stanley & Co.; The First Boston Corporation; and Kidder, Peabody & Co. Incorporated.

> by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. See *Republic Aviation Corp.* v. *Labor Board,* 324 U.S. 793, 800. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb." *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 209 (1947).

In assessing the significance of the market price of Christiana stock, the Court of Appeals correctly recognized that merger terms must reflect the value given and the value received by the respective shareholder groups. Its error was in assuming that the market price of Christiana common stock was the appropriate measure of what the Christiana stockholder group was contributing to the merger (SEC Petition 86a). That market price reflects the underlying value of the assets owned by Christiana less, however, a significant discount attributable to the intercorporate dividend tax payable by Christiana, a large potential capital gains tax liability in the event Christiana's assets were sold or distributed in a taxable liquidation, and a thin trading market. But all these burdens disappear in the merger and do not impair in any way the value of the Du Pont stock owned by Christiana which will be surrendered for retirement. It is that block of stock, as the Commission recognized, that determines the value given in the merger by the Christiana stockholders. The market value of Christiana stock will be merely a matter of history, of no significance to Du Pont or its stockholders.[5]

[5] In relying on the Internal Revenue Code as a principal source

The Court of Appeals' insistence that the merger terms reflect the market value of Christiana stock is, moreover, plainly at odds with this Court's decision in *Niagara Hudson Power Corp.* v. *Leventritt,* 340 U.S. 336 (1951), cited by the Commission in its opinion. There, in approving a plan of reorganization of a public utility holding company as "fair and equitable" under Section 11 of the Public Utility Holding Company Act, 15 U.S.C. § 79k, the Commission determined that warrants were not entitled to participate in the reorganization, despite the fact that they had a market value, because they had no fundamental investment value. The warrant holders urged that the Commission was required to attach significance to the market value of the warrants. In rejecting this contention the Court said:

> "In determining the fairness and equity of compensation to be allowed holders of warrants, the Commission is not bound as a matter of law, any more than in the case of other securities, to limit itself precisely to the values which the market recognizes. *The informed judgment of the Commission, rather than that of the market, has been designated by the Act as the appropriate guide to fairness and equity within the meaning of the Act.*
>
> * * *
>
> "It is enough that the Commission, within its discretion, has given the warrants careful consideration and that under all the circumstances, including their market value, has found the plan to be fair and equitable within the meaning of § 11 of the Act." 340 U.S. at 346-47 (emphasis supplied).

for its conclusion that market value of Christiana stock should control the merger terms, the Court of Appeals improperly conceived the function of the Commission. The court cited a number of gift and estate tax cases in support of its conclusion. Those cases, however, involve a tax based on the "fair market value" of stock as of a particular date, which has been defined in the tax regulations as the amount that would be paid in cash by a willing buyer to a willing seller. (Treas. Reg. § 20.2031-1(b)). While determinations of fair market value for tax purposes are matters for the Commissioner of Internal Revenue, a determination of the fairness and reasonableness of a fundamental corporate realignment under Section 17 of the Act, where stock rather than cash is the medium of exchange on both sides of the transaction, is a matter for the Commission's informed judgment.

The Commission here exercised the same judgment as it did in *Niagara Hudson.* It carefully examined all the factors, including the market value of Christiana stock. It concluded that net asset value, rather than market value, was controlling. As the Commission observed, "investment companies are as a general rule media for long-term investment. That makes net asset value the touchstone" (SEC Petition 32a, n.57). That determination was clearly within the scope of the administrative discretion that the Congress intended the Commission, and not the courts, to exercise.

The Commission found that the termination of Christiana's existence, to be accomplished by the proposed merger, would serve the public interest and likened it to voluntary compliance with the policy of corporate simplification mandated by Congress for public utility holding companies (SEC Petition 20a, n.42).[6] The Court of Appeals in rejecting the Commis-

[6] When Du Pont and Christiana were before this Court in 1960 in connection with their holdings of General Motors stock the Department of Justice urged that the merger of Christiana into Du Pont would accomplish antitrust objectives (Brief for Respondent, No. 55, p.70).

sion's reasoned judgment would render such termination impossible, at least for the foreseeable future.

II. The Court of Appeals Exceeded Its Review Authority in Requiring that Any Tax Savings by Christiana or Its Shareholders be Shared with Du Pont.

The Commission recognized that the proposed merger would benefit the Christiana stockholders significantly more than it would the Du Pont shareholders. It noted, however, that the benefits to the Christiana stockholders would be at no cost or other detriment to Du Pont or its stockholders, that they resulted from the operation of the federal tax laws and stock market phenomena (SEC Petition 10a, 11a). To require Christiana stockholders to forfeit to Du Pont shareholders any significant portion of the intercorporate dividend tax that would not longer be payable by Christiana, or the capital gains tax that might have been payable by some stockholders had Christiana liquidated in a taxable transaction rather than merged, or the appreciation in quoted market value from holding Du Pont common stock directly rather than indirectly, would be to divest Christiana stockholders, as the Commission viewed the matter, of some part of the intrinsic value of their investment (SEC Petition 33a). The Court of Appeals, however, simply ignored the Commission's reasoned analysis and asserted, without citation and as a matter of law, that fairness requires that Du Pont share in the tax savings that result from its cooperation in making the merger possible (SEC Petition 86a, n.35).

The reasoning behind this concept of fairness is quite revealing and perhaps constitutes the principal

explanation of the Court's disagreement with the Commission. In the first place, the Court of Appeals used the term "Du Pont family" as the equivalent of "Christiana stockholders" and its entire consideration of the rights and equities of such stockholders, who number some 8000, was tainted by the special disabilities it found in the "Du Pont family." While acknowledging that the members of the "Du Pont family" are under no duty to maximize their tax liability, the Court of Appeals pointedly observed that the "Du Pont family" had for many years chosen

> "to retain the economic, political and social advantages that accompanies control of one of America's largest industrial enterprises." (SEC Petition 87a).

That choice and those advantages, nowhere further identified, substantially estopped Christiana, the Court of Appeals held, from complaining about the operation of the tax laws, and warranted—indeed required—a substantial exaction from the current stockholders of Christiana [7] because certain of their predecessors in interest—those that were members of the "Du Pont family"—failed to terminate Christiana's existence 35 to 50 years ago and elected, instead, to enjoy advantages, nowhere found to be illegal or improper.

---

[7] While members of the "Du Pont family" continue to own significant amounts of Christiana stock, the number of stockholders alone, 8000, attests that Christiana is no longer a family enterprise. The Commission noted that the purchase of Christiana stock was a common way to make a long-term investment in Du Pont. Some 12 percent of the Christiana stock is held by charitable organizations.

A misunderstanding of the responsibility delegated by Congress to the Commission by the Investment Company Act appears also to have infected the Court of Appeals' decision. It read that Act as requiring the Commission to ascertain the terms that the parties would have arrived at in arm's length bargaining (SEC Petition 61a). Because the Commission looked to the fairness of the terms agreed upon and satisfied itself that there was no overreaching but did not project the terms that might have been arrived at in arm's length bargaining, the Court of Appeals concluded that the Commission had failed to give the proposed merger the "scrutiny . . . intended by Congress" (SEC Petition 61a). Nothing in the Act, however, or in its legislative history suggests that the Commission should conjecture as to the terms of merger that might have been arrived at in arm's length bargaining. Instead, in a transaction between an investment company and its affiliate, the informed judgment of the Commission as to what is fair, reasonable and involves no overreaching has been substituted by act of Congress for arm's length bargaining. The purpose of that substitution, as the Commission observed, is to make sure that neither party exploits a strategic bargaining advantage to the disadvantage of the other, a not infrequent consequence of arm's length bargaining (SEC Petition 8a).[8]

[8] The Court of Appeals found minor fault, almost as an afterthought and certainly not as an essential element of its opinion, with the Commission's assessment of the considerable body of evidence bearing on the likelihood that the merger would engender sales of Du Pont stock in such volume as to have an adverse effect on its market price. The Court agreed with the Commission's conclusion that the market for Du Pont stock is sufficiently broad and strong that it can readily absorb any increased sales that might be expected to flow from the merger without significant effect on price for any extended period of time (SEC Petition 90a, n.39). It held, however, that the Commission should have given some weight to the "occasional detriment" to Du Pont shareholders that might be caused by sales following the merger. The Commission's assessment of the evidence on which the Court of Appeals based this holding was that intrinsic investment values would ultimately determine stock market prices and that transitory fluctuations could not be the predicate for fairness findings under the Investment Company Act (SEC Petition 28a). It was, therefore, clear error for the Court of Appeals to reject the Commission's informed judgment on matters so elusive as short-term stock market behavior and the significance to be accorded such behavior in determining fairness of merger terms.

III. The Court of Appeals Departed From The Accepted and Usual Course of Appellate Procedure.

The procedure followed by the Court of Appeals in exercising review in this matter is an additional reason why a writ should be granted. Professor Upson's participation in the review of the Commission's decision was certainly a departure from accepted appellate procedure, particularly in light of the explicit statutory direction that if additional evidence is deemed necessary on review, the matter must be remanded for the Commission's receipt and consideration of such evidence. (15 U.S.C. § 80a-42). This Court has specifically warned against "abdication of the judicial function," *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957), and has directed that "the focal point for judicial review should be the administrative record already in existence, not some new record initially made in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). And only recently a Court of Appeals has been criticized for going outside the record in reviewing the action of an independent administrative agency. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*,

—— U.S. ——, 44 U.S.L.W. 3413, 3414 (U.S. Jan. 19, 1976).

While the matter of rehearing, particularly in banc, is ordinarily within the discretion of a Court of Appeals, it is difficult to discern a rational basis for the unwillingness of the Court below to review the issues on which two of its members differed so sharply. As matters stand, the judgment of one member of the Court of Appeals and a visiting Senior District Judge has been substituted for the reasoned decision of the Commission in a complex matter in which the Commission's action is entitled to the greatest amount of weight by appellate courts.

CONCLUSION

For the reasons stated in this Petition and in that filed by the Securities and Exchange Commission a writ of certiorari should be granted.

Respectfully Submitted,

DANIEL M. GRIBBON
CYRIL V. SMITH, JR.
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006
Attorneys for Petitioner
E. I. du Pont de Nemours & Company

MATTHEW J. BRODERICK
RICHARD S. SELTZER
EDWARD J. McINTYRE
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, Pa. 19102
Attorneys for Petitioner
Christiana Securities Company

APPENDIX

APPENDIX

Excerpt from the Decision of the United States District Court for the District of Delaware in *Harriman, et al.* v. *E. I. du Pont de Nemours and Co., et al.*, Civil Action No. 4721 (CCH FED. SEC. L. REP. ¶95,386 at 98,940 — 98,942)

SCHWARTZ, *District Judge*

. . .

. . .

c) *Fairness Under the 1940 Act*

The Investment Company Act of 1940 is a comprehensive federal regulatory scheme designed to protect shareholders of investment companies from a variety of sharp practices that had become widespread during the 1930s. *See generally,* "Comment, The Investment Company Act of 1940," 50 *Yale L.J.* 440, 441-2 (1941); Note, "The Investment Company Act of 1950," 41 *Col.L.Rev.* 269 (1941); *Brown* v. *Bullock,* 194 F. Supp. 207 (S.D.N.Y. 1961). Congress concluded that state regulation of investment companies was "impossible," 15 U.S.C. § 80a-1(a), and instead created a pervasive regulatory program aimed at countering specific categories of abuse directed at shareholders of investment companies. *See* 15 U.S.C. § 80a-1(b). *Entel* v. *Allen,* 270 F. Supp. 60 (S.D.N.Y. 1967). Among the most egregious of these abuses was an almost institutionalized phenomenon of investment companies and their portfolios being managed in the interest of affiliates, brokerage concerns or dealer interests, as opposed to being operated for the benefit of their shareholders. *See* 15 U.S.C. § 80a-1(1) and (2); *Herpich* v. *Wallace, supra,* 430 F.2d at 801; *Entel* v. *Allen, supra,* at 65. *See also,* "Comment," *supra,* 50 *Yale L.J.* at 441-2. In order to remedy this particular practice, Congress decided to prohibit securi-

ties transactions between investment companies and affiliated persons [130] thereof, 15 U.S.C. § 80a-17(a), except where the SEC had granted an exemption on the grounds, *inter alia,* that the transaction is fair to all persons concerned, free from overreaching and consistent with the Act's purposes. 15 U.S.C. § 80a-17(b). It is under these provisions that the SEC exemption in the instant case was granted.[131]

The gist of plaintiffs' 10b-5 fairness arguments is that Christiana and its shareholders are, notwithstanding the fiduciary obligations stemming from their control position, improperly profiting at the expense of Du Pont because the market value of Christiana's shares was not utilized in developing the exchange ratio.[132] Viewed from another perspective, plaintiffs are simply attacking the use of Christiana's net asset value since that figure was substantially higher than the market value of Christiana common. In so arguing plaintiffs have overlooked the Investment Company Act of 1940.

The 1940 Act, as detailed above, was designed to protect shareholders of investment companies. One mode of guarding those shareholders' interests was to create various restrictions and prohibitions designed to protect their intrinsic investment in a company's net assets. Thus, for example, the Act erected stringent restrictions on the issuance of senior debt or securities by requiring asset coverage of 200% or 300% respectively for any senior stock or debt securities issued. 15 U.S.C. § 80a-18(a)(1) and (2). The obvious purpose behind these restrictions was to protect common shareholders against dilution of their intrinsic investment value through a highly leveraged capital struc-

[130] See note 8, *supra.*

[131] The correctness of the issuance of that exemption is not before this Court. Instead that question is presently before the Circuit Court of Appeals for the Eighth Circuit.

[132] Complaint, ¶ 11 at 14.

ture, 15 U.S.C. § 80a-1(b)(7), which, in a falling market, could dissipate their investment through a corresponding decline in the market value of the company's securities portfolio. This in turn would leave, after accounting for the prior entitlements of the senior securities, a highly eroded net asset value for the common shareholders. In addition, the Act raised an additional obstacle to highly leveraged capital structures by requiring dividend restrictions in companies with senior debt or stock to preclude avoidance of the aforementioned asset coverage standards. 15 U.S.C. §§ 80a-18(a)(1)(B)[133] and 80a-18(a)(2)(B).

The Act also made net asset value, based upon the market prices of an investment company's portfolio securities, the fundamental valuation criterion of registered investment companies. 15 U.S.C. § 80a-2(a)(41). *Central States Electric Corporation,* 30 S.E.C. 680, 700 (1949). Moreover, despite the fact that the closed-end discount phenomenon was well known in 1940, *Christiana Securities Company, supra* at 23, n.57, Congress decided to prevent dilution of closed-end stockholders' intrinsic values by preventing the issuance of any new common stock "at a price below the current net asset value of such stock." 15 U.S.C. § 80a-23(b).

The Securities Exchange Commission, the agency authorized by Congress to implement the 1940 Act and pass upon otherwise prohibited transactions between investment companies and their affiliates pursuant to section 17(b), 15 U.S.C. § 80a-17(b), has consistently utilized net asset value as the controlling factor in section 17 proceedings. *See, e.g., Central States Electric Corporation,* 30 S.E.C. 680, 700, 724-5. This has been true notwithstanding

[133] While section 18 is not directly involved in the present case, nor is Christiana a highly leveraged investment company, reference to the provisions of section 18 have been made as additional illustrations of the rigorous restrictions applied by Congress to protect shareholders of regulated investment companies.

the fact that the market value of the applicant investment company's stock was significantly lower than its net asset value. *See, e.g., Delaware Realty & Investment Company,* 40 S.E.C. 469 (1961); *Harbor Plywood Corporation,* 40 S.E.C. 1002, 1010 (1962); *Detroit and Clevland Navigation Company,* ICA Rel. Nos. 3082 and 3099 (July 27, 1960 and August 19, 1960); *Townsend Corporation of America,* ICA Rel. No. 4045 (Sept. 2, 1964), CCH *Fed. Sec. L. Rptr.* ¶ 77,120. Net asset value has also been utilized where no market existed for the common stock of an applicant investment company. *Eastern States Corporation,* ICA Rel. No. 5693 (May 28, 1969); *Huyler's,* ICA Rel. Nos. 5773 and 5809 (August 13, 1969 and Sept. 9, 1969); *Southport Commercial Corporation,* ICA Rel. Nos. 4165 and 4180 (Feb. 17, 1975 and March 5, 1965).

Courts are obliged to accord great deference to an administrative agency's construction of the statute it administers. *See, Lucas Coal Company* v. *Interior Board of Mine Operations Appeals,* No. 74-1813 (3d Cir. Aug. 29, 1975). Plaintiffs have been unable to demonstrate any appropriate reason why net asset value should be discarded, the SEC's teachings disregarded, and Congress' mandate ignored in the instant case. The use of net asset value as a valuation device for investment companies stems from the long-term investment characteristics of such entities. *See Christiana Securities Company, supra* at 23, n.57. Since the bulk of Christiana stock has been held by long-term investors there is simply nothing that suggests the inapplicability of net asset value in development of the merger ratio. Further, were net asset value to be cast aside and market value utilized as a significant factor in calculating the instant exchange ratio, the resultant gain to Du Pont's shareholders would improperly deprive Christiana's stockholders of a substantial portion of the intrinsic values of their holdings. *See Id.* at 24.

. . .

. . .

Supreme Court, U. S.
FILED
NOV 18 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

VOLUME 1

IN THE

Supreme Court of the United States

October Term, 1976.

Nos. 75-1870, 75-1872.

No. 75-1870.

E. I. du PONT DE NEMOURS AND COMPANY and CHRISTIANA SECURITIES COMPANY,
Petitioners,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

No. 75-1872.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR CERTIORARI IN NO. 75-1870 FILED JUNE 25, 1976.

PETITION FOR CERTIORARI IN NO. 75-1872 FILED JUNE 26, 1976.

CERTIORARI GRANTED OCTOBER 4, 1976.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS OF APPENDIX.

Vol. 1
Page

Relevant Docket Entries (Eighth Circuit No. 75-1100) A1

Relevant Docket Entries (Eighth Circuit No. 75-1262) A4

Relevant Docket Entries (Eighth Circuit No. 75-1263) A7

Relevant Docket Entries (Securities and Exchange Commission) A10

Notice of Filing of Application, Investment Company Act Release No. 7402 (October 3, 1972) A24

Notice of and Order for Hearing on Application, Investment Company Act Release No. 7563 (December 12, 1972) .. A34

Findings and Opinion of the Securities and Exchange Commission, Investment Company Act Release No. 8016 (December 13, 1974) A38

Order Granting Application, Investment Company Act Release No. 8615 (December 13, 1974) A75

Memorandum Opinion and Order Denying Rehearing, Investment Company Act Release No. 8692 (February 27, 1975) A77

Joint Application, Dated July 19, 1972 ..... A81

Amendment No. 6 to Joint Application, Dated October 27, 1972 ..... A111

Application of Lewis C. Murtaugh for Leave to Intervene as a Party Pursuant to Rule 9(e) A118

Exhibit A:

Request for a Hearing and Advice (October 25, 1972) A129

Supplement to Filed Request (October 31, 1972) .. A155

Supplement to Filed Request (November 14, 1972) A162

Exhibit B A167

Exhibit C A171

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 1
Page

Motion by Lewis C. Murtaugh to Modify Order Fixing Pre-Hearing Procedures A172

Reply of Applicants to Motion to Modify Order Fixing Pre-Hearing Procedures A177

Rejoinder to Reply to Motion to Modify Order A180

Excerpts From Murtaugh Brief A184

Excerpts From Brief of Christiana Securities Company A194

Applicants' Joint Proposed Findings and Conclusions A198

Supplemental Petition of Lewis C. Murtaugh for Rehearing Including a Motion to Adduce Additional Evidence A204

Excerpts From Transcript of SEC Proceedings—

Colloquy A227

Charles C. Townsend, Jr.—

Direct Examination A228

Cross-Examination A285

Re-Direct Examination A306

Re-Cross-Examination A315

Edward Townsend—

Direct Examination A316

Cross-Examination A364

Re-Direct Examination A373

C. Edward Midgley—

Direct Examination A375

Cross-Examination A397

Raymond J. Harter—

Direct Examination A406

Cross-Examination A416

C. Edward Midgley (Recalled)—

Cross-Examination (Continued) A417

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 1
Page

L. E. Grimes—

Direct Examination A420

Cross-Examination A438

Re-Direct Examination A447

Irving S. Shapiro—

Direct Examination A448

Cross-Examination A480

Vol. 2
Page

Cross-Examination (Continued) A513

Edward B. du Pont—

Direct Examination A554

Cross-Examination A566

Charles B. McCoy—

Direct Examination A569

Cross-Examination A596

Re-Direct Examination A608

Colloquy A609

Applicants' Joint Exhibit No. 1A—Morgan Stanley & Co. Letter Dated July 7, 1972 ..... A617

Applicants' Joint Exhibit No. 1B, Exhibit 2, p. 6—Excerpt From Christiana Securities Company—Memorandum of Fact A633

Applicants' Joint Exhibit No. 1B, Exhibit 9—Christiana Securities Company, Net Asset Value Per Share and Discount of Market Price (Based on Mean) (1) A634

Applicants' Joint Exhibit No. 1C—Morgan Stanley & Co. Letter, Dated July 7, 1972 ..... A636

Applicants' Joint Exhibit No. 2—Letter, Dated April 20, 1972, From Irénée du Pont to Mr. McCoy Inquiring as to Interest in a Merger A638

Applicants' Joint Exhibit No. 3—Morgan Stanley & Co. Engagement Letter, Dated June 6, 1972 ..... A640

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 2
Page

Applicants' Joint Exhibit No. 4—Merger Agreement (Conformed Copy, as Executed in December, 1972) A642

Applicants' Joint Exhibit No. 5—Summary of Terms of Comparable Mergers A687

Du Pont Exhibit No. 1—First Boston Corp. Engagement Letter, Dated June 6, 1972 ..... A689

Du Pont Exhibit No. 3—Excerpts From Brief for the United States Supreme Court in the *General Motors* Relief Proceedings (October Term, 1960—No. 55) A691

Du Pont Exhibit No. 4—First Boston Corp. Opinion Letter, Dated July 6, 1972 (Exclusive of Exhibits) A696

Du Pont Exhibit No. 4—First Boston Corp. Opinion Letter, Dated July 6, 1972 (Schedule 3) A700

Du Pont Exhibit No. 4A—First Boston Corp. Letter (Final Opinion), Dated July 7, 1972 ..... A705

Du Pont Exhibit No. 5, pp. 1-20—Excerpts From Preliminary Proxy Statement A707

Du Pont Exhibit No. 5, Exhibit A—Agreement and Plan of Reorganization Between E. I. duPont de Nemours and Company and Christiana Securities Company A754

Du Pont Exhibit No. 5, Exhibit C, pp. 15-19—Excerpts From Index to Financial Statements A793

Du Pont Exhibit No. 5, Exhibit E—Excerpts From Data Concerning Directors A800

Christiana Exhibit No. 1—Kidder, Peabody & Company Engagement Letter, Dated June 6, 1972 ..... A808

Christiana Exhibit No. 2—Kidder, Peabody Report, Dated July 7, 1972 (Exclusive of Exhibits) A810

Christiana Exhibit No. 2, Exhibit 2—Kidder, Peabody Report Assumptions A838

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 2
Page

Christiana Exhibit No. 2, Exhibit 4—*Advantages and Disadvantages (Assuming Net Asset Value Exchange)* A840

Christiana Exhibit No. 3—Kidder, Peabody Opinion Letter, Dated July 17, 1972 ..... A842

Christiana Exhibit No. 4—Table Captioned "Federal Income Tax Basis to Present Holders of Christiana Securities Company Common Stock" A845

Division Exhibit No. 1—Letter From Du Pont to Morgan Stanley, Dated June 6, 1972; Covington & Burling Memorandum Captioned "Factors to Be Considered," Dated June 6, 1972; Memorandum Captioned "Effect of Compliance With Investment Company Act of 1940 on Du Pont", Dated June 13, 1972 ..... A846

Division Exhibit No. 2A—Letter From Dechert Price & Rhoads to Christiana Special Committee of the Board Captioned "Section 333 Liquidation," Dated June 20, 1972 ..... A861

Division Exhibit No. 2B—Letter From Dechert Price & Rhoads to C. Townsend, Jr. of Morgan Stanley, Dated July 8, 1972, With Attachment Captioned "Section 333 Liquidation," Dated July 5, 1972 ..... A877

Division Exhibit No. 3—Draft, Dated June 27, 1972, of Morgan Stanley Report, pp. 9, 21-22 ..... A880

Division Exhibit No. 9—Document (Undated) Captioned "List of Documents for Financial Advisor" A884

Division Exhibit No. 10—Memorandum, Dated June 22, 1972, Captioned "Some Prefatory Remarks for Meeting in New York at FDC on June 23, 1972" A886

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 2
Page

Division Exhibit No. 12—Draft Kidder, Peabody Report, Dated June 30, 1972, pp. 10-11 ..... A889

Murtaugh Exhibit No. 2—Excerpts From Testimony on Second Remand From the United States Supreme Court, *United States v. Du Pont*, 177 F. Supp. 1 (N. D. Ill. 1959), as Found in Printed Record in *United States v. Du Pont*, 366 U. S. 316 (1961), pp. 1053-57, 1506-07, 1516-17, 1558-62, 1739, 2095 ..... A891

Murtaugh Exhibit No. 4—Memorandum to C. E. Welch, Du Pont Legal Department, From Du Pont Treasurer's Department, Dated May 12, 1972 ..... A913

Murtaugh Exhibit No. 5 (Exclusive of Exhibits)—Memorandum, Dated July 10, 1972, to Du Pont Executive Committee From Du Pont Special Committee of the Board A929

Murtaugh Exhibit No. 8—Covington & Burling Memorandum Captioned "SEC Judicial Precedents Respecting the Proposed Du Pont-Christiana Merger," Dated June 6, 1972 (Exclusive of Attachment A) A949

Murtaugh Exhibit No. 9, pp. 11-17—Excerpts From Final Judgment, Dated March 1, 1962 as Amended April 26, 1962, General Motors Divestiture Case A951

Murtaugh Exhibit No. 15—Draft Agreement, Dated December 15, 1972, as to Registration Rights A958

Collins Exhibit No. 1—Letter, Dated October 4, 1972, to Du Pont Stockholders re SEC Notice A974

Collins Exhibit No. 1A—Affidavit of Mr. Harter, Manufacturers Hanover Trust Co. A976

Mr. Richard Collins' Letter to the SEC, Dated October 26, 1972 ..... A978

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 2
Page

Order of the United States Court of Appeals for the Eighth Circuit, Dated October 9, 1975 ..... A981

Report to the United States Court of Appeals for the Eighth Circuit by Roger B. Upson on Questions Asked by the Court, Dated December 9, 1975 ..... A983

Opinions of the Court Below A1028

Judgment of the Court Below A1028

Order Allowing Certiorari (No. 75-1870) A1029

Order Allowing Certiorari (No. 75-1872) A1030

Appendix.

RELEVANT DOCKET ENTRIES

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petition for Review of Order of SEC
Case No. 75-1100

RICHARD J. COLLINS, JR.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

Feb. 7, 1975. Docketing case.

Feb. 7, 1975. Petition for Review of order of SEC. (Exhibit which petitioner wants called to the attention of the Court.)

Mar. 10, 1975. Motion Christiana Securities Co. for leave to intervene.

Mar. 10, 1975. Motion E. I. du Pont de Nemours and Company for leave to intervene.

Mar. 13, 1975. Order: Christiana Securities Co. & E. I. du Pont de Nemours & Co., permitted to intervene.

May 2, 1975. Case consolidated w/75-1262, 75-1263; counsel for petitioners in cases 75-1262 and 75-1263 may have thru May 28 to serve and file briefs;

counsel for respondent and intervenor-respondents may have thru June 30 to serve and file, under one cover, answer briefs to briefs filed by the various petitioners; appendix deferred; court will expect one consolidated appendix in these three cases.

Sept. 8, 1975. Copies of decisions of SEC cited in ans brief received and forwarded to panel (Heaney, Stephenson, Smith) w/75-1262 and 75-1263.

Sept. 10, 1975. Received from SEC copy of Du Pont's Exh. No. 4 admitted in evidence at proceedings on 2/7/73, before SEC; copy of applicants' Joint Exhibit #4 at proceedings on 2/9/73 before SEC; received originals of proceedings before SEC in Christiana Sec. Co., et al., on Feb. 5, 6 and 7, 1973; received originals of proceedings Feb. 8, 9, 12 and 13 and July 23, 1973, Christiana Securities Co., et al., (5 volumes) w/75-1262 and 75-1263.

Sept. 10, 1975. Argued & submitted w/75-1262 & 75-1263 before Judges Heaney, Stephenson & Smith; For Petitioner, Richard J. Collins, Jr., Lewis C. Murtaugh; For intervenor Du Pont, Daniel Gribbon; For respondent SEC; David Ferber; For intervenor Christiana, Matthew J. Broderick; Conclusion by Messrs. Murtaugh & Collins; Recorded (Within five days parties to file briefs regarding Special Master appointment; District Court requested relevant cases.)

Oct. 9, 1975. Order: Professor Roger Upson, Assoc. Dean of U. of Minnesota College of Bus. Admin. has been appointed by this court as a contract consultant in the office of the Circuit Exec. to assist in understanding record made by SEC, etc., with 75-1262 and 75-1263.

Dec. 12, 1975. Professor Roger B. Upson's report on questions asked by the Court, with 75-1262/1263.

Dec. 29, 1975. Received copy of opinion by Judge Schwartz sent to panel by counsel, with 75-1262/1263.

Jan. 23, 1976. Opinion by Judge Heaney; dissenting opinion by Judge Stephenson.

Jan. 23, 1976. Judgment: The order of the Commission granting the application to merge is set aside; costs will be taxed equally to Du Pont and Christiana in accordance with majority opinion.

Feb. 13, 1976. Petition of respondent for rehearing en banc and rehearing with 75-1262 & 75-1263.

Feb. 26, 1976. Order: Respondent's and intervenors' petitions for rehearing with suggestions for rehearing en banc are denied by an equally divided court.

Mar. 8, 1976. Certified copies of judgment forwarded to counsel. (with 75-1262 & 75-1263).

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petition for Review of an order of the SEC
Case No. 75-1262

LEWIS C. MURTAUGH, TRUSTEE FOR EMANUEL AND HELEN STEIB UNDER DECLARATION OF TRUST DATED 8/30/56,

Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent

E. I. du PONT de NEMOURS AND COMPANY,

Intervenor

CHRISTIANA SECURITIES COMPANY,

Intervenor.

1975—7th Circuit.

Feb. 10, 1975. Filed O&3c of a petition for review of an order of the Securities and Exchange Commission—svc.

Mar. 10, 1975. Filed O&3c of motion of Du Pont for leave to intervene—svc.

Mar. 11, 1975. Filed O&3c of motion of Christiana Securities Company for leave to intervene—svc.

Mar. 12, 1975. Entered order granting motion of 3/11/75.

Mar. 14, 1975. Entered order granting motion of 3/10/75.

Mar. 26, 1975. Filed O&3c of respondent's suggestion with respect to transfer proceedings—svc. (75-1236)

Apr. 9, 1975. Entered order transferring to the eighth circuit. (75-1236) Sub. 3/28/75.

1975—8th Circuit

Apr. 18, 1975. Docketing case.

May 2, 1975. Cases consolidated; counsel for petitioners in cases 75-1262 and 75-1263 may have thru May 28 to serve and file briefs; counsel for respondent and intervenor-respondents may have thru June 30 to serve and file, under one cover, answer briefs to briefs filed by the various petitioners; appendix deferred; court will expect one consolidated appendix in these three cases w/75-1100.

Sept. 10, 1975. Argued and submitted w/75-1100 and 75-1263 before Judges Heaney, Stephenson & Smith; For petitioner, Richard J. Collins, Jr., Lewis C. Murtaugh; For intervenor Du Pont, Daniel Gribbon; For respondent SEC, David Ferber; For intervenor Christiana, Matthew J. Broderick; Conclusion by Messrs. Murtaugh & Collins; Recorded (Within 5 days parties to file briefs regarding Special Master appointment; District Court requested relevant cases).

Oct. 9, 1975. Order: Professor Roger Upson, Assoc. Dean of U. of Minnesota College of Bus. Admin. has been appointed by this court as a contract consultant in the office of the Circuit Exec. to assist in understanding record made by SEC, etc. w/75-1100.

Dec. 12, 1975. Professor Roger B. Upson's report on questions asked by the Court, with 75-1100/1263.

Dec. 29, 1975. Received copy of opinion by Judge Schwartz, sent to panel by counsel, with 75-1000/1263.

Jan. 23, 1976. Opinion by Judge Heaney; dissenting opinion by Judge Stephenson w/75-1100.

Jan. 23, 1976. Judgment: The order of the Commission granting the application to merge is set aside; costs will be taxed equally to Du Pont and Christiana in accordance with majority opinion w/75-1100.

Feb. 6, 1976. Petition of Intervenors, E. I. du Pont de Nemours and Co. and Christiana Securities Company, for rehearing en banc and rehearing.

Feb. 13, 1976. Petition of respondent for rehearing en banc and rehearing with 75-1100 & 75-1263.

Feb. 26, 1976. Order: Respondent's and intervenors' petitions for rehearing with suggestions for rehearing en banc are denied by an equally divided court w/1100.

Mar. 8, 1976. Certified copies of judgment forwarded to counsel. (with 75-1100 and 75-1262).

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

—

Petition for Review of an order of the SEC

Case No. 75-1263

—

LEWIS C. MURTAUGH, TRUSTEE FOR EMANUEL AND HELEN STEIB UNDER DECLARATION OF TRUST DATED 8/30/56,

Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

1975—7th Circuit.

Mar. 18, 1975. Filed O&3c of a petition for review of an order of the Securities and Exchange Commission—svc.

Mar. 18, 1975. Filed Clerk's copy of notice of service on counsel for respondent.

Mar. 26, 1975. Filed O&3c of respondent's suggestion with respect to transfer of proceedings—svc. (75-1131).

Apr. 9, 1975. Entered order transferring to eighth circuit (75-1131). Sub. 3/28/75.

1975—8th Circuit.

Apr. 18, 1975. Docketing case.

May 2, 1975. Order: Cases consolidated; counsel for petitioners in cases 75-1262 and 75-1263 may have thru May 28 to serve and file briefs; counsel for respondent and intervenor-respondents may have thru June 30 to serve and file, under one cover, answer briefs to briefs filed by the various petitioners; appendix deferred; court will expect one consolidated appendix in these three cases w/75-1100.

May 13, 1975. Order: Christiana Securities Co. may intervene in this cause; briefing schedule previously established in cases 75-1100, 75-1262 & 75-1263 remains in effect.

Sept. 10, 1975. Argued & submitted w/75-1100 & 75-1262 before Judges Heaney, Stephenson & Smith; For petitioner, Richard J. Collins, Jr., Lewis C. Murtaugh; For intervenor Du Pont, Daniel Gribbon; For respondent SEC, David Ferber; For intervenor Christiana, Matthew J. Broderick; Conclusion by Messrs. Murtaugh & Collins; Recorded (Within 5 days parties to file briefs regarding Special Master appointment; District Court requested relevant cases).

Oct. 9, 1975. Order: Professor Roger Upson, Assoc. Dean of U. of Minnesota College of Bus. Admin. has been appointed by this Court as a contract consultant in the office of the Circuit Exec. to assist in understanding record made by SEC, etc. w/75-1100.

Dec. 12, 1975. Professor Roger B. Upson's report on questions asked by the Court, with 75-1100/1262.

Dec. 29, 1975. Received copy of opinion by Judge Schwartz, sent to panel by counsel, with 75-1100/1262.

Jan. 23, 1976. Opinion by Judge Heaney; dissenting opinion by Judge Stephenson w/75-1100.

Jan. 23, 1976. Judgment: The order of the Commission granting the application to merge is set aside; costs will be taxed equally to Du Pont and Christiana in accordance with majority opinion w/75-1100.

Feb. 13, 1976. Petition of respondent for rehearing en banc and rehearing with 75-1100 & 75-1262.

Feb. 26, 1976. Order: Respondent's and intervenors' petitions for rehearing with suggestions for rehearing en banc are denied by an equally divided court w/1100.

Mar. 8, 1976. Certified copies of judgment forward to counsel (with 75-1100 & 75-1263).

RELEVANT DOCKET ENTRIES BEFORE THE SECURITIES AND EXCHANGE COMMISSION.

Administrative Proceeding Docket
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
No. 3-3928
In The Matter of
CHRISTIANA SECURITIES COMPANY
Wilmington, Delaware
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware

12-13-72 Notice of and order for hearing on application under Sections 17(b), 17(d), 6(c) and Rule 17d-1 for an order exempting transactions between affiliates pursuant to a merger. Hearing to be held at 10:00 AM on 2-5-73 in Washington, D. C. before a hearing officer to be designated. Requests to be heard due 1-15-73. Mailed 12-13-72 Murtaugh (4711); Collins (4712); Shields (4713); May (4714); Elsant (4715).

12-21-72 Original and 7 copies of Motion to Establish Prehearing Procedures and Notice of Appearance of Counsel for Du Pont, filed by Cyril V. Smith, Jr., Esq. (ctf of sv attached).

1- 3-73 Order of Chief Administrative Law Judge Blair designating Administrative Law Judge Ullman as presiding judge at hearing. Mailed 1-3-73 (804868 thru 804873).

1- 4-73 Original and 7 copies of Request for Leave to be Heard and Participant's Brief, filed by Ernest N. May (Affv. of sv attached).

1- 8-73 Original and 7 copies of Notice of Appearance, filed by Richard S. Seltzer, Esq., Dechert Price & Rhoads, on behalf of applicant Christiana Securities Company (cft of sv attached).

1-11-73 Order of Administrative Law Judge Ullman fixing prehearing procedures. Mailed 1-12-73 (804027 thru 804033).

1-15-73 Orig & 7 copies of Application under Sections 17(b), 17(d), and 6(c) and Rule 17d-1 for an order exempting Transactions between Affiliates pursuant to a Merger, filed by Daniel W. Maher individually and as Chairman of Du Pont Outsider Shareholders (ctf of sv attached).

1-15-73 Orig & 7 copies of Application to be heard in the Proceeding, filed by Richard J. Collins, Jr. (ctf of sv attached).

1-15-73 Notice of Appearance of Richard J. Collins, Jr., on behalf of Mrs. Lee J. Collins (ctf of sv attached).

1-15-73 Orig & 7 copies of Application by Mrs. Lee G. Collins to be heard and Notice of Appearance of Richard J. Collins and Mrs. Lee G. Collins, filed by Richard J. Collins (ctf of sv attached).

1-15-73 Orig & 8 copies of Application, filed by Lewis C. Murtaugh (ctf of sv attached).

1-19-73 Ltr dtd 1-18-73 Ernest N. May, to Administrative Law Judge Ullman, with enclosures.

1-22-73 Orig & 7 copies Motion to Modify order fixing pre-hearing procedures, filed by Lewis C. Murtaugh, trustee (ctf of sv attached).

1-22-73 Orig & 7 copies of Christiana Securities Company's List of Witnesses, Subject Matter of Testimony and List of Proposed Exhibits, filed by Matthew J. Broderick, Esq. (ctf of sv attached).

1-22-73 Orig & 7 copies of Reply of Christiana and Du Pont to Application of Lewis C. Murtaugh to intervene as a party, filed by Daniel M. Gribbon, Esq., and Kenneth W. Gemmill, Esq. (ctf of sv attached).

1-22-73 Orig & 7 copies of List of Witnesses and Statement of the Subject Matter of Their Testimony, filed by Richard J. Collins, Jr., Esq., on behalf of himself and Mrs. Lee G. Collins (ctf of sv attached).

1-26-73 Orig & 7 copies of Reply of Applicants, filed by Peter B. Archie, Esq. (ctf of sv attached).

1-29-73 Div's Memorandum in opposition to the Petition of Lewis C. Murtaugh to intervene as a party, filed by Robert Anderson, Esq.—IM (ctf of sv attached).

1-29-73 Orig & 7 copies of (1) Exhibits and Summary of Testimony to be offered jointly by Christiana and Du Pont, (2) Exhibits and Summaries of Testimony to be offered by Du Pont and ctf of sv attached, filed by Peter B. Archie, Esq.

1-29-73 Christiana Securities Company's summary of the testimony of witnesses and copy of exhibits, filed by Richard S. Seltzer, Esq. (ctf of sv attached) (add'l copies to be sent in) (2-2-73 add'l copies rec'd).

1-29-73 Order of Administrative Law Judge Ullman denying Motions for Intervention and for Modification of Order, and Changing Place of Hearing to Room 776. Mailed 1-31-73 (804325 thru 804358).

1-31-73 Rec'd orig & 7 copies of Rejoinder to reply to motion to modify order filed by Lewis C. Murtaugh, Esq., trustee for Emanuel and Helen Steib under declaration of trust dated 8/30/56 (ctf of sv attached).

2- 5-73 Notice of appearance of Robert E. Anderson on behalf of Division of Investment Management Regulation.

2- 5-73 Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie, Esqs. of Covington & Burling, 888—16th Street, N.W., Washington, D. C. 20006 on behalf of E. I. du Pont de Nemours and Company.

2- 5-73 Notice of appearance of Richard S. Seltzer, Kenneth W. Gemmill and Matthew J. Broderick of Dechert Price & Rhoads, 1600 Three Penn Center, Philadelphia, Penn. 19102 on behalf of Christiana Securities Co.

2- 5-73 Notice of appearance of Lewis C. Murtaugh, Esq., as trustee, 141 W. Jackson St., Chicago, Illinois 60604 on behalf of Emanuel & Helen Steib.

2- 5-73 Notice of appearance of Daniel W. Maher, 1136 Canyon Drive, Upland, California, appearing pro se.

2- 5-73 Notice of appearance of Ernest N. May, Suite 106, Weldin Building, 3411 Silverside Road, Wilmington, Delaware 19810, pro se.

2- 5-73 Notice of appearance of Richard J. Collins, Jr., 314 North Broadway, St. Louis, Missouri 63102 on behalf of himself and Mrs. Lee G. Collins.

2- 6-73 Rec'd orig trans of hearing held 2-5-73 in Washington, D. C. pp. 1 thru 161 Sidney Ullman, Administrative Law Judge. Appearances: Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie on behalf of E. I. du Pont de Nemours & Co., Kenneth W. Gemmill, Matthew J. Broderick and Richard S. Seltzer on behalf of Chistiana Securities Co., Robert Anderson, Gerald Osheroff and Peter Kiernan on behalf of the Division of Investment Management Regulation: Ernest N. May pro se: Richard J. Collins pro se; Daniel W. Maher and Lewis C. Murtaugh on behalf of Du Pont Outsider Shareholders Association. Applicants Exs. (Joint) 3, 1-A thru 1-C, and 5 thru 7 in evid. (Exs. retained) Reporter's notes rec'd.

2-13-73 Rec'd orig trans of hearing held 2-6-73 in Washington, D. C. pp. 162 thru 315 Sidney Ullman, Admin. Law Judge. Appearances heretofore noted. Murtaugh's Exs. 2 & 3 for ident only. Divs Exs. 1, 2a thru 2b, 3 thru 8 rec'd in evid. Div's Ex. 9 withdrawn Du Pont's Ex. 1 rec'd in evid. Du Pont's Ex. 4 for ident only. (Exs. retained) Reporter's notes rec'd.

2-13-73 Rec'd orig trans of hearing held 2-7-73 in Washington, D. C. pp. 316 thru 475 Sidney Ullman, Admin. Law Judge. Appearances

heretofore noted. Du Pont's Exs. 2, 4 and 4a rec'd in evid. Div's Exs. 9, 10 & 11 rec'd in evid. (Exs. retained) Reporter's notes rec'd.

2-14-73 Official Notice of Admin. Law Judge Ullman of: File #812-1367-1 (In the Matter of Delaware Realty and Christiana) Exhibit B to the application; Investment Company Act Release #5847; File #811-366-1 & 2, and particularly Section 5, Amendment #1 to the Christiana Registration Statement; and any application in the files of the Commission filed with respect to any case or proceeding which is cited or argued in the briefs of any party or participant. Mailed 2-20-73 (804750 thru 804757).

2-15-73 Order receiving affidavit in evidence as Collins Exhibit 1A. Mailed 2-16-73 (4680 thru 4684 and Collins order & affd. 4685).

2-16-73 Rec'd orig trans of hearing held 2-9-73 in Washington, D. C. pp. 631 thru 739 Sidney Ullman, Admin. Law Judge. Appearances heretofore noted. Div's Ex. 12 rec'd in evid. Du Pont's Ex. 5 rec'd in evid. Appl's Exs. 2 & 4 rec'd in evid. (Exs. retained) Reporter's notes rec'd.

2-16-73 Rec'd orig trans of hearing held 2-12-73 in Washington, D. C. pp. 740 thru 912 Sidney Ullman, Admin. Law Judge. Appearances heretofore noted. Murtaugh's Exs. 1 thru 7 rec'd in evid. Div's Ex. 13 withdrawn. (Exs. retained) Reporter's notes rec'd.

2-16-73 Rec'd orig trans of hearing held 2-13-73 in Washington, D. C. pp. 913 thru 996 Sidney

Ullman, Admin. Law Judge. Appearances heretofore noted. Christiana's Exs. 4 & 5 for ident only. Murtaugh's Exs. 8, 9, 11 thru 15 rec'd in evid. Murtaugh's Ex. 10 rec'd in evid. Du Pont's Ex. 8 rec'd in evid. (Exs. retained) Reporter's notes rec'd.

2-26-73 Ltr dtd 2-22-73 to Sidney Ullman from Ernest N. May (cc: K. W. Gemmill, P. B. Archie, J. Heneghan, Christiana Securities Company, L. E. Grimes and C. E. Welch) calling his attention to the testimony of Messrs. McCoy and Shapiro and commenting on the control of Du Pont Company Management. 3-7-73 copy of letter together with Judge Ullman's order of 3-6-73 sent to R. Collins, L. Murtaugh and D. Maher.

3- 6-73 Order of Administrative Law Judge Ullman making a ltr dtd 2-22-73 from Ernest N. May to the undersigned a part of the record in the proceedings. Mailed 3-7-73 (804027 thru 804032).

3-15-73 Rec'd orig trans of hearing held 2-8-73 in Washington, D. C. pp. 476 thru 630 Sidney Ullman, Administrative Law Judge. Appearances heretofore noted. Christiana's Exs. 1 thru 3 rec'd in evid. Du Pont's Ex. 5 for ident only. Collins Ex. 1 rec'd in evid. Div's Ex. 12 for ident only. (Exs. retained) Reporter's notes rec'd.

3-19-73 Orig & 7 copies of Brief of Christiana Securities Co., in Support, filed by Richard S. Seltzer, Esq. (ctf of sv attached).

3-19-73 Orig & 7 copies of Brief of E. I. du Pont de Nemours and Company in support of Applicant's proposed findings and conclusions, filed by Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie and applicants' joint proposed findings and conclusions filed by Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie on behalf of E. I. du Pont de Nemours and Company, and Kenneth W. Gemmill, Matthew J. Broderick, Stephen R. Miller and Richard S. Seltzer on behalf of Christiana Securities Company (ctf of sv attached).

4- 9-73 Orig & 7 copies of Brief of participant Richard J. Collins, Jr., filed by Richard J. Collins on behalf of himself (ctf of sv attached).

4-11-73 Stipulation as to correction of transcript of hearing, executed by Gerald Osheroff and Robert E. Anderson of Division of Investment Management Regulation; Kenneth W. Gemmill, Stephen R. Miller, Matthew J. Broderick and Richard S. Seltzer on behalf of Christiana Securities Company; Daniel M. Gribbon, Cyril V. Smith, Jr., and Peter B. Archie on behalf of E. I. du Pont de Nemours and Company.

4-16-73 Order of Admin. Law Judge Ullman correcting the transcript in accordance with the proposed corrections set forth in Appendix A attached to the aforementioned stipulation on 4-11-73. Mailed 4-18-73 (804776 thru 804783).

4-20-73 Orig & 7 copies of Brief of Participant Daniel W. Maher, filed by Daniel W. Maher (ctf of sv attached).

4-23-73 Orig & 7 copies of Div's PFC&B, filed by Robert E. Anderson, Esq.-IMR (ctf of sv attached).

4-23-73 Orig & 7 copies of Brief of Lewis C. Murtaugh Trustee for Emanuel and Helen Steib under Declaration of Trust dtd 8-30-56, filed by Lewis C. Murtaugh, Esq. (ctf of sv attached).

4-24-73 Rec'd Div's Exs. 1 thru 12, Applicant's Joint Exs. 1-A thru 1-C, 2 thru 7, Du Pont Exs. 1 thru 4, 4-A, 5, Collins Ex. 1 and Christiana Exs. 1 thru 5, Murtaugh Exs. 1 thru 15. (Ex. files 1 and 2) 3-3928-1 3-3928-1.

4-30-73 Orig & 7 copies of Motion for Oral Argument and Leave to Participate therein, filed by Lewis C. Murtaugh, Esq. (ctf of sv attached).

5-11-73 Ex-parte Communication: Ltr dtd 5-10-73 from Ernest May, to Chairman Cook. (*PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION*).

5-16-73 Orig & 7 copies of the "Reply Brief of E. I. du Pont de Nemours and Company," filed by Peter B. Archie, Esq. (ctf of sv attached).

5-16-73 Orig & 7 copies of the Reply Brief of Christiana Securities Company, filed by Richard S. Seltzer, Esq. (ctf of sv attached).

5-22-73 Ex-Parte Communication: Ltr dtd 5-21-73 from Ernest May, to Commissioner Owens, enclosing copy of letter sent to Chairman Cook. (*PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION*).

5-24-73 Ltr to Ernest N. May regarding Ex-parte Communication and informing that copies will be served on all parties. (*PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION*) Mailed 5-29-73 (804565 thru 804572).

6-13-73 Order scheduling oral argument for 10:00 AM on 7-23-73. If any of the other parties or participants in this proceeding wish to participate in the oral argument, it is requested that they so notify the Secretary of the Commission in writing not later than the close of business on 6-27-73. Mailed 6-14-73 (804844 thru 804851).

6-15-73 Rec'd copy of Complaint filed 6-12-73 re Joan M. Harriman, et al v. E. I. du Pont de Nemours and Company, et al. 73 C 1504-U. S. D. Ct. N. D. of Illinois E. D. HELD in the United States District Court for the Northern District of Illinois Eastern Division.

6-22-73 Orig & 7 copies of Application to Participate in the Oral Argument, filed by Richard J. Collins, Jr. (ctf of sv attached) .

6-22-73 Div's Notice not to participate in the opening oral argument if the Commission will allot the Div 10 minutes to respond to the arguments of the applicants and intervenors, filed by Gerald Osheroff, Esq.,-IMR (ctf of sv attached).

6-25-73 Orig & 7 copies of Request of E. I. du Pont de Nemours and Company to Participate in Oral Argument, filed by Daniel M. Gribbon, Esq. (ctf of sv attached).

6-26-73 Ltr dtd 6-25-73 from Richard S. Seltzer, Esq., advising that the Christiana Securities Company wishes to participate in the oral argument (cc: Parties).

6-26-73 Statement of Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib that he wishes to participate in the oral argument (ctf of sv attached).

7- 2-73 Order fixing time in oral argument: Lewis C. Murtaugh—15 minutes, Richard J. Collins—15 minutes, Counsel for E. I. du Pont de Nemours —15 minutes, Counsel for Christiana Securities Company—15 minutes, and Counsel for the Division of Investment Management Regulation—10 minutes. Mailed 7-3-73 (804217 thru 804222) Mailed 7-12-73 (804394 & 804395).

7- 9-73 Ltr dtd 7-5-73 from Richard J. Collins, Esq. asking where the oral argument will be heard. (cc: Parties).

7-23-73 Minute Memo: The Commission heard oral argument and the matter was taken under advisement.

7-30-73 Rec'd orig trans of oral argument held 7-23-73 in Washington, D. C. pp. 1 thru 41 Commrs: Hugh F. Owens (Acting Chairman, Presiding), Philip A. Loomis, Jr. & John R. Evans. Appearances: Lewis C. Murtaugh, on behalf of Trustee for Emanuel & Helen Steib. Richard J. Collins, on behalf of himself and Mrs. Lee G. Collins. Daniel M. Gribbon, on behalf of E. I. du Pont de Nemours and Company. Matthew S. Broderick, on behalf of Christiana Securities

Company. Gerald Osheroff, on behalf of Enforcement Div. SEC. Joint Ex. 8 file with trans. (Ex. rec'd) Reporter's notes rec'd.

1- 7-74 (Rec'd 1-20-75 in APS) Ltr to Chairman Garrett, Jr. from Daniel M. Gribbon encl. copy of amendment to agreement and plan of reorganization between E. I. du Pont de Nemours and Company and Christiana Securities Company.

1- 8-74 Ex-Parte Communication dtd 1-7-74 from Ernest N. May (cc: Parties) *(PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION).*

1-11-74 Ltr to Ernest N. May regarding above ex-parte communication. Mailed 1-15-74 (804331 thru 804337) Reg. No. 811859 *(PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION).*

10- 8-74 Ex-Parte Communication dtd 10-7-74 from Ernest N. May. *(PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION)* CPY TO PARTIES 10-16-74.

10-11-74 Ltr to Ernest N. May regarding above ex-parte communication. Mailed 10-16-74 (804376 thru 804383) *(PART OF PUBLIC FILE BUT NOT PART OF OFFICIAL RECORD OF ACTION).*

12-13-74 Findings and opinion and order granting application. Mailed 12-17-74 (804814 thru 804817 and 804954 thru 804957).

12-23-74 Petition of Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib, for rehearing in-

cluding a motion for leave to adduce additional evidence, and for further time in connection therewith.

12-26-74 Extension order granting Lewis C. Murtaugh until 1-20-75 to file his petition for rehearing and for leave to adduce additional evidence. Mailed 12-30-74 (804940 thru 804947).

12-30-74 Petition of Richard J. Collins, Jr., for a rehearing (ctf of sv attached).

12-30-74 Ltr dtd 12-27-74 from Richard S. Seltzer changing his firm's address to: 3400 Centre Square West, 1500 Market Street, Philadelphia, Pennsylvania 19102, phone 215-972-3400.

12-30-74 Reply of Christiana and Du Pont to petitions of Lewis C. Murtaugh and Richard J. Collins, filed by Daniel M. Gribbon, Cyril V. Smith, Jr., Peter B. Archie and Richard S. Seltzer.

1- 2-75 Answer of the Div. of Investment Management Regulation to petitions of Richard J. Collins, Jr., and Lewis C. Murtaugh, filed by Gerald Osheroff (ctf of sv attached).

1- 6-75 Memorandum of Richard J. Collins, Jr., concerning the opinion of the SEC dated 12-13-74 (ctf of sv attached).

1-20-75 Supplemental petition of Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib under declaration of trust dtd 8-30-56 for rehearing including a motion for leave to adduce additional evidence (ctf of sv attached).

2- 3-75 Reply of Du Pont and Christiana to supplemental position of Lewis C. Murtaugh, filed by

Daniel M. Gribbon and Kenneth W. Gemmill (ctf of sv attached).

2- 6-75 Answer of the Div. of Investment Management Regulation to petition of Lewis C. Murtaugh for rehearing and for leave to adduce additional evidence filed by Gerald Osheroff (ctf of sv attached).

2-27-75 Memorandum opinion and order denying rehearing and leave to adduce additional evidence. Mailed 3-3-75 (804311 thru 804318).

(Investment Company Act Release No. 7402)

—

Administrative Proceeding File No. 3-3928

—

UNITED STATES OF AMERICA

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
OCTOBER 3, 1972

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. du PONT de NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)

Investment Company Act of 1940

—

NOTICE OF FILING OF APPLICATION UNDER SECTIONS 17(b), 17(d) AND 6(c) AND RULE 17d-1 FOR AN ORDER EXEMPTING TRANSACTIONS BETWEEN AFFILIATES INCIDENT TO A MERGER.

NOTICE IS HEREBY GIVEN that Christiana Securities Company ("Christiana"), a Delaware corporation, registered under the Investment Company Act of 1940 ("Act") as a closed-end non-diversified management investment company, and E. I. du Pont de Nemours and Company ("DuPont"), a Delaware corporation (hereinafter collectively referred to as "Applicants"), have filed a joint application pursuant to Sections 6(c), 17(b) and 17(d) of the Act and Rule 17d-1 thereunder, for an order exempting from the provisions of 17(a) and permitting

under Section 17(d) and Rule 17d-1 certain transactions incident to a proposed merger of Christiana into DuPont, with DuPont as the surviving corporation. All interested persons are referred to the application on file with the Commission for a statement of the representations therein, which are summarized below.

Christiana owns approximately 28.3% of the outstanding common stock of DuPont. Accordingly, Christiana presumptively controls DuPont within the meaning of Section 2(a)(9) of the Act, and the companies are affiliated persons as defined in Section 2(a)(3) of the Act. Moreover, certain directors, officers and other affiliated persons of Applicants are stockholders of Christiana or DuPont or both companies.

Christiana has outstanding 106,500 shares of 7% cumulative preferred stock, having a liquidation value of $100 per share and a redemption price of $120 per share, and 11,710,103 shares of common stock. Christiana's common stock is traded in the over-the-counter market in only limited quantities, and its market price consistently has been less than the market value of Christiana's underlying assets, generally ranging from 20% to 25% less during the two years preceding public announcement of a possible merger. There are approximately 6,683 holders of Christiana common stock and 1,516 holders of the preferred stock. Christiana's assets consist of cash and securities, of which the most important holding is 13,417,120 shares (28.28%) of the outstanding common stock of DuPont. The value of the total security holdings of Christiana as of July 17, 1972, based primarily on market values, was $2,226,814,066, of which 98.7% was represented by its holdings of common stock of DuPont. The remaining security holdings of Christiana consist primarily of 16,256 (.96%) shares of the $4.50 preferred stock of DuPont, 69,216 (3.45%) shares of the common stock of

Wilmington Trust Company ("Wilmington") and all of the outstanding shares of the News Journal Company ("News Journal"). The total value of $2,226,814,066 for the security holdings of Christiana is based on the average closing prices on the New York Stock Exchange on July 10 through 14, 1972 for the DuPont common and preferred stock ($2,199,854,642); the average closing bid prices in the over-the-counter market on July 10 through July 14, 1972, for the Wilmington common stock ($2,699,424); and the fair market value of the News Journal common stock based upon an appraisal as of July 17, 1972 ($24,260,000). Christiana also has other assets consisting, at June 30, 1972, of (1) cash and cash equivalents, less current liabilities, in the net amount of $5,981,367 and (2) a claim for refund of Federal income taxes and interest, carried on the books as a deferred charge in the amount of $11,723,013.

Christiana's net asset value has been adjusted as follows for purposes of the proposed merger:

Total Net Asset Value of Christiana (as above)	$2,244,518,446
Less Adjustments:	
Adjustment to reflect tax claim at no value	11,723,013
Distribution cost for Wilmington Trust (3% of market value)	80,983
Capital gains tax @ 30% on sale of:	
Wilmington Trust (tax basis = $903,592)	514,455
News-Journal (tax basis = $846,107)	7,024,168
Merger expenses (50% of estimated total expenses)	750,000
Cash reserved for tax claim expenses	1,000,000
Adjusted Net Asset Value of Christiana	$2,223,425,827

Under the plan of merger, the tax claim, together with $1,000,000 of Christiana's cash to be reserved to cover expenses to pursue the claim, will be treated at the time of the merger as having no value. The tax claim and related cash reserved for expenses will become the property of DuPont on the effective date of the merger, and if upon settlement of the tax claim any proceeds are realized they will be distributed to the former Christiana shareholders as described below. The expenses of the merger are to be shared equally. Accordingly, the net asset value of Christiana's cash and cash equivalents has been adjusted to reflect both the reservation of the $1,000,000 related to the tax claim and $750,000 related to merger expenses. The application also states that DuPont intends to hold the Wilmington and News-Journal stock for only the period required for the orderly disposition thereof. Accordingly, the net asset values of these holdings have been adjusted to reflect the estimated expenses of disposition and a tax of 30% on the capital gains which would result from their sale at the values reflected for such assets.

DuPont has outstanding 1,688,850 shares of $4.50 Series cumulative preferred stock without par value, 700,000 shares of $3.50 Series cumulative preferred stock without par value, and 47,566,694 shares of common stock held by approximately 224,964 shareholders.

Under the proposed plan of merger, the outstanding common stock of Christiana will be converted into DuPont common stock at the rate of one share of Christiana common stock for each 1.123 shares of DuPont common stock. For the purpose of computing this conversion ratio, Christiana was valued at 97½% of the adjusted value of its net assets, as described below, and the DuPont common stock to be issued to the Christiana common stockholders was valued at $163.875 a share, the average closing market price for DuPont common stock on the New York Stock

Exchange on the five trading days immediately preceding July 17, 1972, the date on which the proposed merger plan was approved in principle by Christiana and DuPont's Boards of Directors. The number of additional shares of DuPont common stock, if any, to be distributed to the former Christiana common stockholders upon settlement of the tax claim will be determined by converting any net proceeds from the settlement, along with any residue of funds reserved for payment of expenses of pursuing the tax claim, into DuPont common stock having corresponding value and such shares will be delivered to an agent appointed for such purpose. The agent will distribute such additional shares of DuPont common stock pro rata to the former Christiana common stockholders in proportion to the DuPont common stock received by them in the merger transaction. The price for DuPont common stock to be used for the foregoing conversion will be the average of the closing prices for DuPont common on the New York Stock Exchange for the ten trading days preceding the date on which refund payment by the Government is received by DuPont or, if no refund is to be received, the date on which judgment to that effect becomes final.

On the effective date of the merger the Christiana preferred stock will be converted into DuPont common stock having a current market value equal to $120 per preferred share, the preferred call price. The DuPont common stock to be exchanged for such preferred stock will be valued at the average of the closing prices for the common stock on the New York Stock Exchange for the ten trading days preceding the effective date of the merger. The conversion rate was estimated at .7323 shares of DuPont common stock for one share of Christiana preferred stock, based on the current average price for DuPont common stock on July 17, 1972.

The shares of DuPont common stock used for the merger will be newly issued shares. All common and preferred stock of DuPont owned by Christiana will be retired in the merger. All other shares of DuPont will remain outstanding. DuPont will not issue fractional shares to the stockholders of Christiana. Instead, such stockholders having a fractional interest in a share of DuPont common stock will be provided an opportunity, through an agent appointed for such purpose, to (1) sell such interest or (2) purchase the additional fractional interest required to make up one full share.

Under Delaware Corporation Law, after approval of the agreement of merger by the respective boards of directors of Christiana and DuPont, the affirmative vote of the holders of a majority of the total outstanding shares of common stock of each company will be required. Christiana and DuPont will arrange for special meetings of their stockholders, after obtaining the requested exemption order, for stockholder vote on the merger proposal, such vote to be subject to receipt of a Ruling from the Internal Revenue Service that the proposed merger may be consummated on a tax-free basis. Under Delaware Corporation Law, any holder of Christiana's preferred stock who objects in writing within the prescribed time may receive a cash payment equal to the appraised value of his preferred stock. No such right is available with respect to any Christiana common shares or to any DuPont common or preferred shares.

The proposed plan of merger and the method of determining the conversion ratios were developed on the basis of independent financial studies made by three investment banking firms acting as financial advisors. The investment banking firms were engaged by special committees of the Boards of Christiana and DuPont, which had been ap-

pointed to negotiate and submit recommendations with respect to the proposed merger. In the case of each company, the Special Board Committee consisted of two directors with no director, officer or employee relationship with the other company. Independent studies and recommendations regarding a suitable range of merger terms were prepared by Morgan Stanley and Company, to advise both Christiana and DuPont; Kidder, Peabody and Company, Inc., to advise Christiana separately; and First Boston Corporation to advise DuPont separately. Negotiations by the Special Board Committees were conducted with due consideration of the recommendations made by the financial advisors regarding ranges of merger terms they would consider fair and reasonable, and resulted in proposals by the Special Board Committees for a merger with terms thereof based on 97½% of Christiana's adjusted net asset value, that is, a discount of 2½%. However, the effective rate of discount is approximately 1.8% to the Christiana shareholders when effect is given to their recapture of approximately 28% by reason of becoming shareholders of DuPont. The DuPont Special Board Committee considered merger terms reflecting the proposed discount of Christiana's adjusted net asset value fair and reasonable for all parties affected, and appropriate in the circumstances to provide sound business reasons for DuPont to undertake the merger and the disposition of those securities acquired in the merger which DuPont does not wish to retain. The Christiana Special Board Committee considered the terms fair and reasonable for all concerned in the light of significant benefits in the merger to the Christiana common stockholders in acquiring a more readily marketable security, elimination of the sizable market discount from net asset value which has prevailed on the Christiana stock prior to the merger announcement, and

the elimination of the Federal income tax payable by Christiana at the currently effective rate of 7.2% on dividends received on the DuPont common stock. As to the Christiana preferred stockholders, the application states that the market value of their holdings will increase to the amount at which they could have been redeemed.

Applicants state they are requesting a ruling from the Internal Revenue Service to the effect that no gain or loss for Federal income tax purposes will be recognized to either DuPont or Christiana or to their stockholders as a result of the merger except with respect to (1) cash received by any Christiana stockholder in connection with his disposition of an interest in a fractional share of DuPont common stock, (2) cash received by any dissenting preferred stockholder of Christiana who elects appraisal rights and (3) certain portions of any contingent distribution in connection with the tax claim.

The proposed discount as a basis for the merger falls within the range recommended by each of the financial advisors, and each has expressed the opinion that the resultant merger terms are fair and reasonable for all parties affected.

Section 17(a) of the Act prohibits an affiliated person of a registered investment company, or an affiliated person of such a person, from selling to or purchasing from such registered company or any company controlled by such registered company, any security or other property, subject to certain exceptions, unless the Commission upon application pursuant to Section 17(b) grants an exemption from the provisions of Section 17(a), after finding that the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair and do not involve overreaching on the part of any person concerned, that the proposed transaction is consistent with the policy of the

registered investment company, as recited in its registration statement and reports filed under the Act, and is consistent with the general purposes of the Act. Section 17(d) of the Act and Rule 17d-1 thereunder, taken together, provide among other things, that it shall be unlawful for any affiliated person, acting as principal, to participate in, or effect any transaction in connection with any joint enterprise or arrangement in which any such registered company, or a company controlled by such registered company, is a participant unless an application regarding such arrangement has been granted by an order of the Commission. Section 6(c) of the Act provides that the Commission may conditionally or unconditionally exempt any transaction or class of transaction from any provision of the Act if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

NOTICE IS FURTHER GIVEN that any interested person may, no later than October 27, 1972, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the matter accompanied by a statement as to the nature of his interest, the reason for such request and the issues of fact or law proposed to be controverted, or he may request that he be notified if the Commission should order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D. C. 20549. A copy of such request shall be served personally or by mail (air mail if the person being served is located more than 500 miles from the point of mailing) upon Applicants at the address stated above. Proof of such service (by affidavit or in case of an attorney at law by certificate) shall be filed contemporaneously with the request. At any time after said date, as

provided by Rule 0-5 of the Rules and Regulations promulgated under the Act an order disposing of the application herein may be issued by the Commission upon the basis of the information stated in said application, unless an order for hearing upon said application shall be issued upon request or upon the Commission's own motion. Persons who request a hearing, or advice as to whether a hearing is ordered, will receive notice of further developments in this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commission, by the Division of Investment Company Regulation, pursuant to delegated authority.

Ronald F. Hunt,
Secretary.

(Investment Company Act Release No. 7563)

—

Administrative Proceeding File No. 3-3928

—

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

December 13, 1972

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)

Investment Company Act of 1940

—

NOTICE OF AND ORDER FOR HEARING ON APPLICATION UNDER SECTIONS 17(b), 17(d), AND 6(c) AND RULE 17d-1 FOR AN ORDER EXEMPTING TRANSACTIONS BETWEEN AFFILIATES PURSUANT TO A MERGER

—

Christiana Securities Company ("Christiana"), a Delaware corporation registered under the Investment Company Act of 1940 ("Act"), and E. I. du Pont de Nemours and Company ("Du Pont"), a Delaware corporation (hereinafter collectively referred to as "Applicants"), have filed a joint application pursuant to Sections 6(c), 17(b), and 17(d) of the Act and Rule 17d-1 thereunder for an order exempting from the provisions of 17(a), and permitting under Section 17(d) and Rule 17d-1, certain transactions incident to a proposed merger of Christiana into Du Pont, with Du Pont as the surviving corporation.

The Commission, on October 3, 1972, issued a notice of the filing of said application (Investment Company Act Release No. 7402). The notice, which is incorporated herein by reference, gave interested persons an opportunity to request a hearing and stated that an order disposing of the application might be issued upon the basis of the information stated therein, unless a hearing should be ordered.

Certain interested persons have filed requests for a hearing. It appears to the Commission that it is appropriate in the public interest and in the interest of investors that a hearing be held with respect to said application.

IT IS ORDERED, pursuant to Section 40(a) of the Act, that a hearing on the aforesaid application under the applicable provisions of the Act and of the rules of the Commission thereunder be held on February 5, 1973 at 10:00 a.m., in the offices of the Securities and Exchange Commission, 1100 L Street, N. W., Washington, D. C. 20005. At such time, the Hearing Room Clerk will advise as to the room in which such hearing will be held. Any person desiring to be heard or otherwise wishing to participate in the proceeding is directed to file with the Secretary of the Commission his application as provided by Rule 9(c) of the Commission's Rules of Practice, on or before January 15, 1973 setting forth any issues of law or fact which he desires to controvert, or any additional issues which he deems raised by this Notice and Order or by such application. Persons filing an application to participate or be heard will receive notice of any adjournment of the hearing as well as other actions of the Commission involving the subject matter of these proceedings.

IT IS FURTHER ORDERED that any officer or officers of the Commission designated by it for that purpose shall preside at said hearing. The officer so designated is hereby

authorized to exercise all the powers granted to the Commission under Sections 41 and 42(b) of the Act and to an Administrative Law Judge under the Commission's Rules of Practice.

The Division of Investment Company Regulation has advised the Commission that it has made a preliminary examination of the application and that upon the basis thereof the following matters and questions are presented for consideration without prejudice to its specifying additional matters and questions upon further examination:

(1) Whether the terms of the proposed transactions, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;

(2) Whether the proposed transactions are consistent with the policy of Christiana, as recited in its registration statement and reports filed under the Act;

(3) Whether the proposed transactions are consistent with the general purposes of the Act;

(4) Whether the participation of Du Pont and Christiana in such transactions on the basis proposed is consistent with the provisions, policies and purposes of the Act, and the extent to which the participation of Du Pont or Christiana is on a basis different from, or less advantageous than, that of other participants; and

(5) Whether the terms of the proposed transactions reflect a disproportionate weight given to either the market value or the net asset value of Christiana securities.

IT IS FURTHER ORDERED that at the aforesaid hearing, attention should be given to the foregoing matters.

IT IS FURTHER ORDERED that the Secretary of the Commission shall give notice of the aforesaid hearing by mailing a copy of this Notice and Order by registered mail to the Applicants and to the persons who have requested a hearing; that notice to all other persons be given by publication of this Notice and Order in the Federal Register; and that a general release of this Commission in respect of this Notice and Order be distributed to the press and mailed to the mailing list for releases.

By the Commission.

Ronald F. Hunt,
Secretary.

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

INVESTMENT COMPANY ACT OF 1940
Rel. No. 8016/December 13, 1974
Admin. Proc. File No. 3-3928

In the Matter of
CHRISTIANA SECURITIES COMPANY
Wilmington, Delaware
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware
(812-3224)

FINDINGS AND OPINION OF THE COMMISSION.

MERGER OF A REGISTERED INVESTMENT COMPANY INTO ITS AFFILIATE

Mergers Generally—Applicable Standards—Disparity in Benefits—Historical Factors

Where registered closed-end investment company and affiliated operating company made joint application under Investment Company Act for exemption from statutory prohibition so as to permit proposed merger of investment company into affiliated company, *held*, the terms of the proposed merger, including exchange ratio based on underlying net asset value of investment company rather than aggregate market price of its own shares, are reasonable and fair and do not involve overreaching, and are consistent with the Act's general purposes. Exemption *granted*.

Where registered closed-end investment company formed in 1915, a quarter of a century prior to the enactment of the Investment Company Act, for the sole purpose of controlling an industrial company, whose securities were its only asset of any consequence, wished to merge into such industrial company and where, because of tax factors and other reasons benefits to investment company were greater than those to industrial company, *held*, imbalance of benefit does not render transaction inherently unfair; some transactions are more important to one side than to the other.

Where functionless investment company sought to merge into its affiliated portfolio company, *held*, public policy against the perpetuation of unnecessary entities makes it inappropriate for the Commission to insist on terms likely to result in investment company's continued existence.

Intrinsic Investment Values versus Market Prices

Intrinsic investment values, *held*, controlling in assessing fairness of proposed merger of closed-end investment company into portfolio company. Contention that hypothetical adverse market impact of merger of closed-end investment company into its affiliated portfolio company should be given great weight in assessing fairness of merger proposal, *rejected*, just result could be attained on basis of investment company's net asset value without conjectural assessment of market impact.

Restraints on the Power of Alienation

Proposal by objecting stockholders for restraints on the alienability of marketable securities to be issued pursuant to proposed merger on ground that unrestricted sales of such securities would lower the market price of

the objectors' shares, *rejected,* as unnecessary under the circumstances.

Taxation

Where registered investment company's managers' decision to merge it into its affiliated portfolio company was motivated by tax factors which led them to prefer a merger that would require the Commission's approval under the Act to a liquidation that would give investment company's shareholders the net asset value of their holdings but impose substantial and uncertain tax liabilities on them, *held,* Act's "reasonable and fair" standard does not entitle portfolio company's shareholders to the benefit of the taxes that the United States would otherwise have collected.

Dissolution of Registered Investment Company

Merger of registered investment company into its affiliated portfolio company that would eliminate duplicative operating expenses and taxation, *held,* consistent with Investment Company Act's purposes. Finding of consistency with investment company's purposes under Section 17(b)(2) of the Act, *not required,* where company's existence is to be terminated.

PRACTICE AND PROCEDURE

Asserted Inadequacy of the Record
Request for Remand
Pre-Trial Discovery
Depositions
Due Process
Rules of Practice

Objecting security holders' request for remand to supplement assertedly inadequate record, *denied,* because

matters into which they wished to inquire irrelevant under governing legal principles.

Hearing officer's denial of requests for depositions, *affirmed,* where Commission's rules made no provision for such depositions.

Due Process does not require depositions.

APPEARANCES:

Kenneth W. Gemmill, Matthew J. Broderick, Stephen R. Miller and *Richard S. Seltzer,* of Dechert Price & Rhoads, for Christiana Securities Company.

Daniel M. Gribbon, Cyril V. Smith, Jr. and *Peter B. Archie,* of Covington & Burling, for E. I. du Pont de Nemours and Company.

Gerald Osheroff, for the Division of Investment Management Regulation of the Commission.

Lewis C. Murtaugh, of Murtaugh, King, Neiman & Grais, *pro se.*

Richard J. Collins, Jr., of Rassieur, Long, Yawitz & Schneider, *pro se.*

Ernest N. May, pro se.
Daniel W. Maher, pro se.

I.

This case involves one of the world's greatest industrial complexes. It is here under the Investment Company Act of 1940. Its origins, however, go back to 1915.

At that time T. Coleman du Pont [1] was the largest single stockholder of E. I. du Pont de Nemours and Company ("Du Pont").[2] He wished to dispose of that interest. To keep Coleman's large block of stock within the family thus assuring its continued control of the enterprise, Cole-

1. The du Pont family spells its name with a lower-case "d."

2. In this opinion the company's name is hereinafter spelled with an upper-case "D."

man's cousin Pierre joined with others to form a holding company.[3] That was Christiana Securities Company.[4] It began life with the substantial amount of Du Pont stock acquired from Coleman plus other blocks of that security contributed by Pierre and by other family members in exchange for Christiana shares.[5] Thus Christiana was organized by members of the du Pont family for the service of their own interests. Through Christiana, the family's dominant faction made sure that its massive holdings in Du Pont would be voted as a block.[6] Christiana was a control device. Historians friendly to Pierre and to the family point out that:

> "[I]t was as chairman of the Christiana Securities Company that his power was most explicitly defined. His immediate family held over 60% of Christiana common stock, and Christiana in turn held over 30% of the Du Pont common stock outstanding (through Delaware Realty[7] and personal holdings the share held by Pierre's family in Du Pont was even higher). Since the Du Pont Company still owned close to 35%

3. With one exception, all of the people involved were members of the du Pont family. And the outsider was a man closely linked to the family.

4. Christiana was at first called Du Pont Securities Company. It took its present name in 1918.

5. The historical treatment is based on CHANDLER & SALSBURY, PIERRE S. DU PONT AND THE MAKING OF THE MODERN CORPORATION 322-358 (1971). For other accounts see JAMES, ALFRED I. DU PONT: THE FAMILY REBEL (1941) (critical of Pierre and his associates and castigating them as "the secret six"), DONALDSON, CAVEAT VENDITOR (privately printed 1964) presenting the situation from Coleman's viewpoint.

6. The historical writings cited in the preceding footnote show that a family feud between Pierre and his cousin Alfred had much to do with Christiana's origins.

7. See *Delaware Realty and Investment Company*, 40 S. E. C. 469 (1961) (Footnote added).

> of the voting stock of General Motors, the family had practical control of that corporation."[8]

II.

The du Pont family is large. And since the family rewarded outstanding managerial performance with Christiana stock, there were some non-du Pont stockholders in Christiana from the very beginning.[9] So by 1940, when the Investment Company Act went into effect, Christiana had far more than a handful of stockholders.

Christiana registered under the Act. It had to do so for two reasons:

> (A) Christiana had more than the 100 security holders whose presence, with other facts, brings the Act into play.[10]
>
> (B) Christiana maintained, and still maintains, that it did not and does not run Du Pont. It insists that it is not Du Pont's parent. It concedes that it "has the potential to exercise a controlling influence over Du Pont," but it has consistently contended that this potential lies dormant and unexercised and that there is no actual control relationship. This, its own version of the facts, made, and makes, Christiana an investment company of the closed-end, non-diversified type rather than an industrial holding company.[11]

8. CHANDLER & SALSBURY, PIERRE S. DU PONT AND THE MAKING OF THE MODERN CORPORATION 564-565 (1971). On page 565 the authors note that "During the 1920s Pierre and his brothers were obsessively concerned about assuring control."

9. CHANDLER & SALSBURY, PIERRE S. DU PONT AND THE MAKING OF THE MODERN CORPORATION 581 (1971).

10. Section 3(c)(1).

11. For fuller discussion see this Commission's 1966 report on the PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH, House Report No. 2337, 89th Cong., 2d Sess. 40, n. 54.

III.

Today Christiana is still what it was at its birth in 1915, a receptacle for a huge block of Du Pont common stock. It holds 28.3% of the issue. This massive commitment accounts for something like 98% of Christiana's total assets.[12]

Christiana's stock is still highly concentrated. While it has over 11 million common shares outstanding, 95.5% of them are held by a mere 338 people. Christiana remains in overwhelming measure a du Pont family affair, 75% of its outstanding shares being held by family members.

This does not mean that Christiana is just a collective name for the descendants of the original stockholders. It is a publicly held company with about 8,000 stockholders. There is an over-the-counter market in the issue, and for reasons hereinafter explained, Christiana shares have over the years had a certain appeal to a few of the many people who wanted to invest in Du Pont. It was—and for that matter, still is—cheaper to buy into Du Pont indirectly by buying Christiana than it was to acquire the underlying Du Pont shares themselves. Someone with $10,000 that he wanted to invest in Du Pont common could do so in one of two ways. The first was to buy $10,000 worth of Du Pont on the New York Stock Exchange. The second was to buy $10,000 worth of Christiana in the over-the-counter market. Since Christiana, like most other closed-end investment company issues, has long tended to sell at a substantial discount from net asset or liquidation value,

12. It also holds a small block of Du Pont preferred. The non-Du Pont assets consist of the two daily newspapers in Wilmington, Delaware, and 3.5% of the stock of the Wilmington Trust Company. *Qua* trustee for various du Ponts and du Pont relatives, the Trust Company holds more than half of Christiana's common stock.

the Christiana buyer got what could be regarded as a real bargain. His $10,000 purchased an interest in Du Pont that might have cost him $12,000, $13,000 or $14,000 had he acquired it in the direct Du Pont form rather than in the indirect Christiana form. One did not have to be a du Pont in order to see the point. The record suggests that some of the 338 large holders previously referred to may be wholly unconnected with the founding family. Although members of the du Pont family still hold about 75% of Christiana, the other 25% belongs to public investors.

IV.

Those who control Christiana (and who presumptively at least are for present purposes deemed to control Du Pont as well [13]) think that Christiana has outlived its usefulness. Du Pont, they say, is no longer a family firm. Hence the family no longer needs Christiana. It has no contemporary function.

And Christiana is expensive. It costs something to run. Much more important than administrative costs are the taxes that have to be paid because of Christiana's existence. For practical purposes, Christiana's income consists entirely of the dividends it collects from Du Pont. Yet Federal income tax has to be paid on those dividends before they can be distributed to Christiana's stockholders. Were there no Christiana and were the present Christiana stockholders to own their Du Pont shares directly, there would be no such tax.

Accordingly, Christiana's management urges that Christiana merge into its portfolio company, Du Pont.

13. Under Section 2(a)(9) of the Act an interest of more than 25% in voting securities is presumed to constitute control. We also note that Christiana and Du Pont have five common directors.

Du Pont's management agrees.[14] The salient features of the joint Christiana-Du Pont proposal are these: [15]

(1) Christiana's assets and liabilities will become those of Du Pont.[16]

(2) Accordingly, Du Pont will reacquire the 13,417,120 shares of its own common now in Christiana's portfolio.[17] Those shares will be retired.

(3) Each Christiana common share will become 1.123 shares of Du Pont.[18]

14. In addition to the five common directors referred to in the preceding footnote, another seven of Du Pont's 26 directors own Christiana common stock.

15. The application before us states that the 12 Du Pont directors who are also directors or stockholders of Christiana did not participate in the consideration of the merger proposal.

16. Du Pont intends to dispose of the newspaper interests and the bank stock (see n. 12 on p. 5, *supra*) to be acquired from Christiana.

17. Christiana's 16,256 shares of Du Pont's $4.50 preferred (0.96% of the outstanding shares of that class) will also be reacquired by Du Pont.

18. In time the present Christiana holders may also receive some additional Du Pont stock. This would stem from a contingent, unliquidated tax refund claim that Christiana now has against the United States. Du Pont will acquire that claim. If it collects on it within five years from the effective date of the merger, it will distribute additional shares of its common whose then current market value will equal the proceeds of the claim. Should the tax refund claim remain unsettled and unadjudicated within the aforementioned five-year period, the number of additional shares issued will be based on the then fair value of the claim.

The plan makes provision for the holders of Christiana's 106,500 7% callable preferred. Those shares are callable at $120. Accordingly, the plan calls for their conversion into shares of Du Pont with a then market value of $120, based on the average closing price of Du Pont common stock on the New York Stock Exchange for the ten trading days immediately preceding the effective date of the merger, plus cash equal to the accrued dividend. Du Pont states that its present intention is to offer dissenting Christiana preferred holders who follow Delaware's statutory appraisal procedures $120 in cash (plus the accrued dividend) for each share.

The merger is designed to be tax-free to Christiana and its stockholders. Accordingly, it is conditioned on a ruling to that effect by the Internal Revenue Service.

V.

Like other corporate mergers, this one cannot be consummated unless the law of the state of incorporation (in this case Delaware for both companies) is followed. Hence the stockholders of both companies must approve. Were this an ordinary amalgamation between industrial or mercantile firms, the merits of the matter would be none of our concern. Our responsibility would be solely that of seeing to it that the two companies' stockholders were told enough about the proposal to enable them to reach an informed judgment. The decision would be theirs, not ours.

But Christiana is an investment company, and the Congress that passed the Investment Company Act deemed transactions of this character to be fraught with potential for overreaching and unfairness.[19] Accordingly, it prohibited them,[20] subject to our power to lift the prohibi-

19. Section 1(b)(2) of the Act states that "the national public interest and the interest of investors are adversely affected—when investment companies are . . . managed . . . in the interest of directors, officers, . . . or other affiliated persons thereof . . . , in the interest of special classes of their security holders, or in the interest of other investment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders." Of special significance here is Section 1(b)(2)'s reference to investment companies' affiliated persons. Christiana and Du Pont are "affiliated persons" of each other. That is so because Christiana owns more (far more) than 5% of Du Pont's voting securities. See Sections 2(a)(3)(A) and 2(a)(3)(B).

20. Section 17(a)(1) of the Act makes it "unlawful for any affiliated person [of] . . . a registered investment company . . . knowingly to sell any security or other property to such registered company." The proposed combination would take the form of a statutory merger. But this would constitute a "sale" by Christiana

tion [21] "if evidence establishes that . . . the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of *any* person [22] concerned." [23]

Does this transaction meet that test? That is the central question before us.[24] A negative answer will end the

20. (Cont'd.)
of its assets to Du Pont within the meaning of Section 17(a)(1). *E. I. du Pont de Nemours & Company*, 34 S. E. C. 531 (1953), overruling *Phoenix Securities Corporation*, 9 S. E. C. 241 (1941).

21. Section 17(b) provides that "notwithstanding subsection (a), any person may file with the Commission an application for an order exempting a proposed transaction . . . The Commission *shall* [emphasis added] grant such application and issue such order of exemption if . . ."

22. Because of its special impact here the word "*any*" has been italicized. Its presence means that we must find this transaction fair to the stockholders of both companies. See *Bowser, Inc.*, 43 S. E. C. 277 (1967).

As we said in *Fifth Avenue Coach Lines, Inc.*, 43 S. E. C. 635, 639 (1967): "[T]hat Section 17(a) by its terms makes it unlawful for the affiliate, rather than the investment company, to engage in specified types of transactions, does not . . . indicate a Congressional concern for the shareholders of the investment company to the exclusion of the other stockholders affected. While it is true that the protection of fund shareholders was a primary consideration which led to the passage of the Act, we find nothing in the legislative history which persuades us that Congress intended the broad language of Section 17(b) to be read in the restrictive manner which applicants suggest, nor have we ever done so. We cannot believe the Congress intended, after requiring an agency of the Government to examine a transaction such as this, to put that agency in the position of effectively authorizing the transaction when there are circumstances raising questions as to possible overreaching of a person concerned which has public investors."

23. Section 17(b)(1).

24. But it is not the only question presented. Under Section 17(b)(2) we must also find the proposed transaction consistent with Christiana's policy. And Section 17(b)(3) precludes approval unless we find the merger consistent with the Act's general purposes. Its primary general purpose, of course, is the protection of investors. Finally, the parties invoke Section 17(d) and our Rule 17d-1 thereunder, which taken together prohibit joint enterprises

matter. Should our answer be in the affirmative, the managers of both companies will be at liberty to proceed to seek the approval of their stockholders.

VI.

At first blush it is hard to see a real problem here. In economic reality Christiana stock already is Du Pont stock—under another name. Substantially, all that we are dealing with is an exchange of equivalents.

Christiana owns 13,417,120 shares of Du Pont common. But there are only 11,710,103 Christiana common shares outstanding. It follows that a Christiana common share is in economic substance 1.15 shares of Du Pont common. Make a few simple adjustments for the relatively inconsequential preferred stocks of the two companies and for the newspaper interests and the bank stock that Du Pont will get from Christiana [25], and the whole thing is over.

That in essence is the view of the two companies involved. Our Division of Investment Management Regulation agrees. But three Du Pont stockholders disagree.[26]

VII.

The objecting Du Pont stockholders consider the view just outlined misleadingly simplistic. They contend that this transaction will:

24. (Cont'd.)
and joint arrangements between investment companies and persons affiliated with them, unless we approve the specific transaction involved.

25. See n. 12 on p. A44, *supra*.

26. These stockholders, Lewis C. Murtaugh, Richard J. Collins, Jr. and Daniel W. Maher, participated in the hearings before the administrative law judge. An initial decision having been waived, the case came to us after the record was closed. Briefs were filed, and we heard oral argument. Our findings are based on an independent review of the record.

(A) Confer great benefits on Christiana's stockholders;

(B) Give Du Pont's stockholders nothing worth mentioning but actually injure them; and

(C) Serve no real business purpose for Du Pont.

VIII.

The objectors are clearly right when they say that the merger will be a very good thing indeed for Christiana's stockholders. Their benefits will stem from:

(A) The federal tax structure; and

(B) Stock market phenomena.

We begin with the tax factors. There are two of them. One is the federal corporate income tax that Christiana now pays.[27] The United States Treasury takes 7.2 cents out of every dollar of dividend income that Christiana gets before such dividend income is disbursed to the Christiana stockholders.[28] So the merger will increase each Christiana stockholder's individual pre-tax income by 7.2% over what he would receive if Du Pont dividends continued to be passed through Christiana.[29] Of course, this 7.2% accretion will be taxable income in the individual stockholder's hands. A particular Christiana stockholder's net tax benefit will therefore depend on the tax bracket in which he happens to find himself. To the extent that Christiana stock is held by people in high tax brackets, the actual increment to the Christiana stockholders' net after taxes will be significantly less than 7.2%.[30] The second tax factor relates to the tax cost of alternative methods of achieving the end that the applicants wish to reach. Christiana could be killed off without any need for our prior (or for that matter subsequent) approval. Nothing in the Act or anywhere else in the law inhibits a registered investment company from liquidating. But a liquidation might be much more expensive for Christiana's stockholders than this tax-free plan.[31] Liquidation would certainly be a great deal more conjectural.[32]

27. Many closed-end investment companies do not pay federal corporate income taxes. They, like most of the open-end companies, avail themselves of the special treatment that Subchapter M of the Internal Revenue Code gives to so-called regulated investment companies, i.e., companies regulated by this Commission under the Investment Company Act. Such companies are free from all corporate income taxes so long as they distribute all of their income to their stockholders. But this special tax benefit is available only to "diversified" investment companies. Christiana, of course, is as undiversified as an investment company can possibly be. Hence its federal income tax status is no different from that of any other corporation. Sections 851-855 of the Internal Revenue Code.

28. The applicable normal corporate income tax is 48%. Section 11 of the Internal Revenue Code. But *all* corporations (whether investment companies or not) are entitled to deduct from their income 85% of any dividends that they receive. Section 243 of the Code. Thus the maximum effective federal corporate income tax on dividend income is 48% of 15% or 7.2%.

29. Christiana pays out substantially all of its after-tax income in dividends.

30. Additional savings will stem from the elimination of Christiana's operating expenses. The application states, however, that those expenses are "relatively minor."

31. Christiana's tax picture is said to be clouded by reason of the distributions of General Motors common stock resulting from the antitrust divestiture decree entered against Du Pont. *United States v. E. I. du Pont de Nemours & Co.*, 366 U. S. 316 (1961). We are told that this is so because:

> "(a) the fair market value of the General Motors stock received by Christiana pursuant to the antitrust divestiture decree . . . is the subject of a tax refund suit by Christiana against the United States Government and is thus presently indeterminable;
>
> (b) the effect of pro rata distributions by Christiana of General Motors stock to its own stockholders is uncertain under the tax laws, and
>
> (c) the effect of distributions by Christiana of General Motors and Hercules Powder Company stock . . . is uncertain."

32. Christiana's brief states that its "stockholders would in effect be voting tax litigation for themselves were they to sanction a liquidation."

In view of what has just been said about the special 7.2% tax burden on Christiana's stockholders, it would be unsurprising to find Christiana's shares selling at a discount of about that magnitude from net asset value.[33] Actually, however, the discount has been much higher than that. When the merge negotiations were first announced it was 23%. During the preceding two years it had been as high as 25% and was never below 20%.

The mere announcement of the planned merger led to an appreciable narrowing of the discount. Its consummation will, of course, extinguish the discount forever. Thus the merger will substantially enhance the market value of the Christiana stockholders' property.

What is the offsetting benefit to Du Pont's stockholders? Applicants point to the fact that Christiana's stockholders will get only 97.5% of its adjusted net asset value. This looks like a 2.5% discount from net asset value. But the actual dilution to be suffered by the Christiana stockholders will be only 1.8%. That is so because Christiana is so substantial a Du Pont stockholder. Since Christiana has a 28.3% interest in Du Pont, 28.3% of the 2.5% discount will go right back into the Christiana holders' pockets. Accordingly, objectors dismiss the discount as derisory, a mere "pacifier."

The objectors' claim of positive harm to themselves and the other similarly situated Du Pont stockholders rests entirely on market factors.[34] They point out that from a

33. Implicit in this statement is the somewhat unrealistic assumption of a market for Du Pont common that is entirely income-oriented.

34. Some Du Pont stockholders are also Christiana stockholders. Objectors do not weep for them. Their concern is with the people whose interest in Du Pont stems entirely from their ownership of its stock. Since there are over 225,000 Du Pont holders as against a mere 8,000 Christiana holders, it is obvious that most Du Pont stockholders belong to the class whose interests the objectors champion.

stock market point of view Christiana's massive block of Du Pont is sterilized. Christiana has never sold any of its Du Pont. Nor, so long as it remains in being, is Christiana ever likely to do so.

The enormous capital gains taxes that would have to be paid are enough in themselves to inhibit Christiana from selling any of its Du Pont holdings. Those taxes would arise at two levels. First, at the corporate level there would be a very heavy tax on Christiana itself. The basis of its Du Pont shares is but a tiny fraction of those shares' present value. And should Christiana follow its past practice of distributing all of its income to its stockholders, a second onerous tax would fall on the individuals who own Christiana.

Most of Christiana's stock has a very low basis in the hands of those who now hold it. That is so because:

> (A) The holders either paid much less for it than it is now worth or acquired it from donors who bought it for far less than present value; and
>
> (B) The basis of their Christiana shares has already been materially reduced by reason of their receipt of substantial qualities of General Motors stock, pursuant to the Du Pont diverstiture distribution.[35]

The objectors say that the merger will work a radical change in this state of affairs. They note that the corporate capital gains tax inhibition will vanish. After Christiana is dead and gone, no one will worry about the capital gains taxes that it would have had to pay had it remained alive. True, the holders of about 70% of Christiana's stock state that they have no present intention of selling the Du Pont

35. See n. 31 on p. A51, *supra*. Some 3 million Christiana shares (roughly 25% of the issue) have a zero basis.

shares to be received in exchange for their Christiana holdings. But the objectors point out that:

> (A) No binding commitments to refrain from selling have been given.[36]
>
> (B) The plan's carefully crafted provisions for Securities Act registration statements at the selling stockholders' expense (twice a year on a non-firm commitment basis and once a year on the basis of a firm commitment underwriting for at least $25 million) show that some important holders have given some thought to some selling at some time.
>
> (C) Public investors unrelated to Christiana's control group own about 25% of the company's stock. Hence the merger will give them about 3¼ million shares of Du Pont common. They will be as free as other non-controlling Du Pont stockholders to sell those shares whenever and wherever they choose without registering them under the Securities Act.

Objectors argue that the merger will have an adverse impact on them even if nobody actually sells. They ask us to focus on potential available supply. Such supply will, they say, be increased by over 13 million shares. The market's knowledge of this is bound to depress the price. Ergo, Christiana should be required to compensate the Du Pont stockholders for the "vast and virtually uncontrolled increase in the supply of marketable stock" flowing from the merger.

As for Du Pont, objectors argue that it has been doing well all these years and will continue to do well with or

36. Indeed, the Wilmington Trust Company, record owner of more than half of Christiana's outstanding shares (see n. 12 on p. A44, *supra*) states that its fiduciary responsibilities may require it to do some selling from time to time.

without Christiana; that applicants have failed to show that Christiana is an incubus to Du Pont; and that though the proposal does a great deal for the du Pont family, it does nothing of consequence for Du Pont. True, after the merger's consummation Du Pont will have about 188,500 fewer common shares outstanding than it now does. But presently outstanding shares of that issue number 47,445,810. So the number of shares outstanding will be diminished by a mere four-tenths of one percent.

One objector argues for a substantial increase in the contemplated 2.5% or 1.8% (depending on whether one looks at gross or at net impact) discount from Christiana's net asset value.[37] The other two also urge an increase in the discount. But they go on to attack the whole affair root and branch. They consider it an outrageous assault on the rights of the Du Pont stockholders and on the law of supply and demand. What they deem essential are conditions to "protect the price of Du Pont shares." They therefore implore us to impose restraints on the alienability of the new Du Pont common shares to be issued pursuant to the merger.

IX.

Applicants consider the objectors' contentions frivolous and absurd. So does our Division of Investment Management Regulation.[38] We take a different view. To

37. See p. A52, *supra*.

38. Though in accord with the applicants on every substantive point presented, the Division has certain qualms about the performance of the financial experts who testified on their behalf with respect to the value of Christiana's Du Pont holdings. It asks us to say some harsh words about those experts and to make a pronouncement about the role of an independent expert in a proceeding of this character. We agree with the Division that financial experts should be diligent, conscientious, and painstaking. On the record before us, we think it inappropriate to go beyond that truism. The im-

us the questions presented are substantial and troublesome. This is not an easy case. But after careful consideration of the issues raised, we find ourselves constrained to resolve them against the objectors and to grant the application before us.

That there is an imbalance of benefit is plain. This merger cannot possibly do as much for Du Pont as it will for Christiana. The very slight reduction in the amount of Du Pont's outstanding common and the resulting increase in earnings per Du Pont common share is incommensurate with the tax and the market value benefits inuring to the Christiana stockholders.

Applicants ask us to look at other benefits that will, they say, be reaped by Du Pont and its stockholders. We have done that. And we find their magnitude far from striking.

---

38. (Cont'd.)
portance of expert testimony varies from case to case. In some situations such testimony is crucial. When a closely held firm or a business of an esoteric character must be appraised, much turns on what the experts say. *La Salle Street Capital Corporation,* Investment Company Act Release No. 6693 (August 23, 1971) is illustrative. That case presented a question about the value of a major league baseball franchise. Such questions are, as was said at page 7 of the *La Salle Street* opinion, "not susceptible to precise determination." The instant case, on the other hand, involves marketable securities. The questions presented are in our view essentially legal. Hence they cannot be resolved by reference to the opinions of financial experts, however conscientious and however eminent. We do not go so far as to say that expert testimony is of no weight here. Some of it we have found interesting and even instructive. But in view of the nature of the issues raised, we think its weight limited. We note, for example, that some of the experts seem to have spent a great deal of time studying our decisions under Section 17 of the Act and pondering the implications of the opinions in those cases. That sort of thing is normally the function of a lawyer, not of an expert witness. The Division has, we think, failed to give due heed to the special nature of this concrete case. Observations about experts in our past opinions have been mechanistically transposed to contexts quite different from those in which they were uttered.

Apart from the small reduction in the number of Du Pont shares outstanding and the resulting small increases in book value and in earnings per Du Pont common share, it is said that Du Pont will benefit from:

> (A) The "dispersal" of Christiana's large block of Du Pont common; and
>
> (B) Its escape from the Investment Company Act, which precludes it from entering into transactions with Christiana without our approval.

The "dispersal" argument is somewhat puzzling. Applicants insist over and over again that it is most unlikely that any substantial number of Du Pont shares will come to market by reason of the proposed transaction. In that regard applicants point quite cogently to the large individual capital gains taxes that selling Christiana holders will have to pay and to the long-run character of the du Pont family's investment commitment to the company that bears its name. What then is likely to be dispersed?

It would seem that the dispersal will be formal, not substantive. Today some people own a great deal of Du Pont indirectly through Christiana. Tomorrow those very same people will still own a great deal of Du Pont. But they will own it directly rather than indirectly. What will that change do for Du Pont?

DuPont's answers to these questions look to the long run. Its brief concedes that its "management was aware of no immediate prospect of any adverse consequences from the Christiana holdings." The brief goes on to argue, however, "that over the long term such a possibility might arise."

The precise nature of these possible long-term adverse consequences is obscure. The argument rests on the possibility of a future clash between the people then in

control of Christiana and the people then managing Du Pont. It assumes that in this hypothetical situation the Du Pont managers will be the "good guys" and the Christiana control group the "bad guys." The argument seems far-fetched and rests on premises we consider unacceptable. Christiana's extinction may well make it somewhat easier for Du Pont's managers to maintain themselves in office. We, however, cannot presume that this will necessarily be in the Du Pont stockholders' interest.[39] And in any event the Investment Company Act was not designed to foster the retention of control by managerial groups. Nothing in it warrants a holding that such control is to be preferred to control by important stockholders.[40]

No showing has been made that the Investment Company Act imposes any really onerous burdens on Du Pont. No doubt the applications that the company is required to file by reason of its affiliation with Christiana are something of a nuisance.[41] But no contention has been made that the Act has interfered or is likely to interfere with the company's business. Hence we find it is difficult to view Du Pont's exit from the Act's net as a significant benefit.

But the Act's requirement that the transaction be reasonable, fair, and free from overreaching, does not mean

39. As a former Chairman of this Commission recently observed: "The raider may . . . be a better manager than the raidee." Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 Bus. Law. 1101, 1105 (1974).

40. Certain Delaware decisions seem to hold otherwise. They are beside the point. Our concern here is not with the niceties of local corporation law, but with broad Federal investor-protection standards formulated in large measure because of the inadequacies of local corporation law. See Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L. J. 663 (1974).

41. Our files show that there have been approximately 50 applications since the Investment Company Act went into effect back in 1940.

that the benefits to the parties must be nicely balanced. Such a reading would be wholly impractical and would frustrate legitimate arrangements. Some transactions are more important to one side than to the other. This one is of that type. And that does not make it inherently unfair under Section 17(b). Nor does the fact that Christiana has much more at stake than Du Pont mean that the consideration moving from Christiana to Du Pont must be large enough to inflict really substantial detriment on the former.

The benefit to Du Pont is far from awesome. But it is sufficient to meet the statutory standard. Christiana is a legal device. Those who invented it did so to serve their own purposes.[42] And they had every right to do that.

42. The parties did not go into Christiana's history on the record. But we thought it appropriate to take administrative notice of some fairly well-known facts of economic history. And we did so at the outset of this opinion. We cannot forget that Christiana as an investment company is of a very special kind and that the situation with which we are confronted was created long, long before anyone dreamed of any such statute as the Investment Company Act. Compare *Hawaiian Electric Company, Inc.*, Holding Company Act Release No. 16592 (January 26, 1970), p. 5 where our view of the Public Utility Holding Company Act's impact on the matters there before us was much influenced by Hawaii's unique history.

The Public Utility Holding Company Act to which we have just referred has a certain bearing here. As applicants note, Section 11(b)(2) of that statute mandates the elimination of unnecessary holding companies in the industries affected. Were that Act applicable to Christiana, it would have vanished long ago. Nobody suggests that it serves any real purpose in the world of today. Of course, Du Pont is neither an electric company nor a gas company. So we have no power to destroy Christiana on our own motion. But we think the policy against the multiplication of superfluous corporate entities articulated in the Holding Company Act sound and salutary. When as here questions about wholly unnecessary entities come before us in non-utility contexts, it is quite inappropriate for us to insist on their perpetuation or to impose terms likely to lead the parties to conclude that it would be cheaper and better to keep them alive.

Now the investors' heirs and successors in interest conclude that the device is obsolete. That is their privilege. Nothing in the Act compels them to pay a high price for exercising it.[43] Only if their decision to dismantle

43. But they must pay a fair price. And in assessing the fairness of the proposed price one is struck by the fact that the Securities Act restricts the marketability of Christiana's massive block of Du Pont. Objectors do not demur to the proposal on this ground. Nor does our staff. We, however, have considered the question *sua sponte*. We have done so because (1) as the Commission pointed out some years ago, "the valuation of restricted securities at the market quotations for unrestricted securities of the same class would, except for most unusual situations, be improper." ("*Restricted Securities*," Investment Company Act Release No. 5847, Accounting Series Release No. 113 (October 21, 1969)); and (2) in the normal case a discount of only 2.5% from net asset value would be much too small to reflect the diminution in value resulting from the restrictive feature. After such consideration, we find this one of those "most unusual situations" referred to in the above-cited release in which it is proper to value restricted securities at the price assigned by the market to unrestricted securities of the same class.

The typical investment company-restricted security situation involves the acquisition of a block of restricted securities for investment at a price below that at which unrestricted securities of the same class are selling, with the discount (usually a substantial one) being attributable to the restrictions imposed by the Securities Act on persons who take securities in so-called private placements. None of these factors is present here. Christiana's 13,417,120 shares of Du Pont were not acquired for investment in the ordinary sense of that term. Those shares are a historic control block assembled almost two decades before anyone thought of any such statute as the Securities Act. And although the price Christiana paid for its Du Pont holdings was nominal when viewed in relation to their present value, it received no discounts at the time of purchase. What has just been said is more than historical digression. It has contemporary relevance. A block of securities restricted under the Securities Act because it is large enough to confer control cannot be equated mechanically for all purposes with smaller non-controlling blocks restricted only because they were acquired in transactions claimed to have been exempt from the Securities Act's registration and prospectus-delivery requirements by reason of the special provision in Section 4(2) of that statute for "transactions . . . not involving any public offering." Our policy with respect to the valuation of restricted stock by investment companies rests on two principal considerations. First, the impropriety of an in-

Christiana inflicts cognizable harm on Du Pont and on its stockholders unrecompensed by the proposed discount, can we insist on terms harsher for them than those now before us.[44]

43. (Cont'd.)
vestment company recording essentially fictitious profits by buying restricted stock at a discount and then marking it up to the market; and secondly, the fact that stock which cannot be publicly sold without registration normally is worth less than stock which is free for trading. Neither consideration is applicable here. Christiana did not acquire Du Pont stock at a discount by reason of the status of that stock under the Securities Act, and Christiana never intended to, and never has, traded in and out of Du Pont stock. If Christiana had ever made the clearly momentous decision to attempt to sell its Du Pont stock, registration under the Securities Act would have been the least of its problems.

Also pertinent in this regard is the fact that much (probably most) of the Du Pont stock to be received by the Christiana stockholders will itself be restricted under the Securities Act. To discount the value of those persons' present indirect holdings in Du Pont on the ground that those holdings are restricted under the Securities Act and then to give them new direct Du Pont shares that would be similarly restricted, would involve a double subtraction that we deem impermissible.

44. It might seem that the discount should at the very least equal the 7.2% income tax benefit to be realized by the Christiana stockholders. However, their actual benefit will in most cases be less than 7.2%. See A50 & A51, *supra*. This consideration, however, we put to one side. The heart of the matter is that the tax benefit to be reaped by the Christiana people will inflict no corresponding detriment on Du Pont or on its stockholders. The burden will fall wholly on the United States. And neither the du Pont family nor the other Christiana holders are under any duty to maximize their tax liabilities. As the Court of Appeals for the Second Circuit said when it spoke through Judge Learned Hand in *Helvering v. Gregory*, 69 F. 2d 809, 810 (1934): "Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." Also in point are Judge Hand's subsequent observations when he dissented in *Commissioner v. Newman*, 159 F. 2d 848 (C. A. 2, 1947), *cert. denied* 331 U. S. 859 (1947): "[T]here is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of

Another aspect of this case illustrates that principle. The Christiana stockholders could have caused Christiana to be liquidated. They would then have become the direct owners of the Du Pont shares now held by Christiana. Had they done so, the situation would have been essentially the same as that contemplated by this merger.

But a liquidation, unlike this merger, would have adverse tax consequences for Christiana's stockholders. And in view of the problems attributable to the General Motors divestiture, the extent of their potential tax liability is shrouded in uncertainty.[45] The proposed merger is thus designed to avoid the serious tax problems that Christiana's liquidation would engender for its stockholders. Aside from those tax problems, however, the economic impact of this merger on Du Pont and its stockholders is no more onerous than the impact that would be produced were the Christiana stockholders to exercise their prerogative to liquidate Christiana. More specifically, the possible market effects resulting from the Christiana stockholders acquiring direct ownership of the Du Pont shares would be the same. It may be that in the course of bargaining between wholly unrelated parties, Du Pont could have exacted a handsome price for permitting consummation of the transaction in a form that relieves the Christiana stockholders of their tax problems. But Du Pont's failure to do that does not render the transaction unreasonable or unfair. The Du Pont stockholders, including the objectors, have no property interest in the Christiana stockholders'

44. (Cont'd.)
morals is mere cant." 159 F. 2d at 850-851. Nor do we see how Section 17(b)'s "reasonable and fair" standard can be deemed to require Christiana's stockholders to turn every nickel of their tax savings over to Du Pont. The tax savings are of some weight. But it does not follow that the Du Pont stockholders are to be subrogated to the rights that the United States now enjoys under the status quo.

45. See n. 31 on p. A51, *supra*.

tax problems. A principal reason why Section 17 of the Investment Company Act requires us to pass upon the fairness of transactions such as this, is to prevent persons in a strategic position from using that position to effect transactions for other than fair value. And fair value does not change simply because a strategic position arises from something other than affiliation.

X.

That brings us to what we think the crux of the case: the objectors' claim of detriment by reason of market impact.

Here we find a hot dispute about the probable facts. Objectors envision endless torrents of Du Pont shares descending on the market. Although never too clear about exactly what they expect to happen, they profess great alarm about the low prices to which Du Pont common will fall.[46] Applicants laugh at that. They say that nobody is going to sell anything. Christiana's brief tells us that:

46. But they never explain why Christiana's holders would be eager to sell at such depressed levels. Objectors have no doubts about Du Pont's investment merit. Indeed, they think Du Pont a pearl of great price. Nor do they suggest that those who guide Christiana's destinies have any real doubts about Du Pont. The objectors' position is self-contradictory. On the one hand, they stress the great wealth of the du Ponts. On the other, they are (or claim to be) obsessed by the virtual certainty of massive sales at distress prices. But why should people whose remoteness from the brink of destitution is constantly stressed by the objectors themselves rush off madly to dispose of valuable property for less than its intrinsic worth? Objectors never answer that question. Instead they shift their ground by moving from the Christiana control group to the non-controlling public investors who own about 25% of Christiana. These people, they note, will be free from the Securities Act's registration and prospectus-delivery inhibitions. They proceed to postulate devastating waves of helter-skelter selling by the public holders. These horribles seem fanciful to us. We see no reason to assume that there will be a psychosis epidemic among either the controlling or the non-controlling Christiana stockholders. We think that in financial matters at least both groups are at least as rational as the general run of Humanity.

> "In the present situation, there is no reason to suppose that the distribution of Du Pont shares to Christiana stockholders will add even one share to the market for Du Pont stock. The consummation of the merger will simply leave the Christiana stockholder with Du Pont shares in place of the Christiana shares he has formerly held—in most cases—for many years. There is no reason to suppose that the Christiana stockholder will sell those shares . . . [A]dverse tax consequences will be visited on a former Christiana stockholder if he does sell Du Pont stock. Those consequences are a strong deterrent to sale since receipt of the Du Pont stock in the merger will be tax-free."

We think the objectors' prophecies much too gloomy.[47] Hence it looks to us as though the applicants have the better of the argument. But we refrain from enmeshing ourselves in this thicket of conjectures about what people are likely to do in the future with their own property.

We assume that the merger may engender some selling that would otherwise not take place. We assume further that such selling may at certain points in time be substantial. Proceeding on those assumptions, we are nevertheless after considerable thought unable to detect any uncompensated detriment to the Du Pont stockholders of a type that we can properly take into account.

The stock market has its peculiarities. In essentials, however, it is much like other more basic markets in goods, services, and the factors of production. Here as elsewhere increased supply will (all other factors being equal—which in practice they may or may not be) lower prices. Should the Wilmington Trust Company decide to sell a substantial amount of Du Pont common, the price of the issue will be affected to some extent.

47. Our reasons have been stated in the preceding footnote.

We agree with the objectors about that. But we disagree with their contention that this short-run view of the pricing process is the one that governs here. What we have before us in these proceedings is a proposal for a fundamental corporate readjustment. In that context transitory market phenomena are of secondary significance. We look at the case not from the objectors' tape-watcher perspective,[48] but as a problem in economic realities and business fundamentals.[49]

48. We cast no aspersions on tape watchers. They have every right to speculate. And while pursuing their own self-interest, they sometimes perform a useful social function. Hence they are often the objects of our solicitude. But that is so in matters arising under the Securities Exchange Act. When we work under this Act, under Chapter X of the Bankruptcy Act, and under the Public Utility Holding Company Act, their interests yield to those of the long-term investor.

49. We may draw attention to what we consider the striking parallel between Section 17(b)(1)'s reasonable, fair, and free from overreaching test and the "fair and equitable" standard that Congress laid down in the Bankruptcy Act (Sections 174, 221(2)), and in the Public Utility Holding Company Act (Section 11(e)). True it is that the words "fair and equitable" have a precise technical meaning in insolvency law. Nor are we unmindful of the distinctions that may well be drawn between a legally mandated reorganization under the Holding Company Act and a consensual arrangement such as the one now before us. But the ancient reorganization concept of "fair and equitable" also has a broader meaning that we think indistinguishable from the Investment Company Act test that governs here. See *Protective Committee v. Anderson*, 390 U. S. 414, 424-441 (1968).

Hence we find the many reorganization cases that emphasize intrinsic value and deprecate market factors persuasive here. See, e.g., *S. E. C. v. Central-Illinois Securities Corp.*, 338 U. S. 96, 152 (1949) ("Congress, perhaps believing that the application of such an amorphous standard as that of 'colloquial equity' was beyond the competence of courts and commissions, has instead prescribed the requirement that investment values be preserved."); *Niagara Hudson Power Corp. v. Leventritt*, 340 U. S. 336, 346-348 (1951) ("The informed judgment of the Commission, rather than that of the market, has been designated by the Act as the appropriate guide to fairness and equity within the meaning of the Act. Under the standards approved by this Court, that informed judgment looks for

Hence we find ourselves compelled to discount objectors' market impact worries even more heavily than they would have us discount Christiana's net asset value. A share of Du Pont common is a fractional proprietary interest in a large business. In no way will the Christiana merger detract from either the assets or the earning power of that business. The fundamentals of the situation will remain as they are. Thus the merger cannot affect—and no contention has been made that it would or could affect—Du Pont's intrinsic investment value. That the merger might possibly engender selling of a volume that could on occasion cause Du Pont's market price to dip below the level at which it would otherwise stand is of little moment. Such undervaluation would undoubtedly attract the attention of investors and speculators interested in chemical issues. They could scarcely escape noticing it. And why would they spurn the resulting bargain? Nothing brought to our attention suggests that the marketplace might be slow to notice Du Pont's cheapness relative to comparable stocks. And we see no reason to assume that it would. We therefore conclude that such depressing effects on the price of Du Pont common as may occasionally manifest themselves by reason of the proposed transaction will be of relatively brief duration. We proceed on the premise that

49. (Cont'd.)
investment values. . . . [T]he *Central-Illinois* case . . . expressly rejected the 'colloquial equity' approach of the District Court, which placed special emphasis upon market history. . . . Moreover, we find no lack of authority . . . [for] the general principle that a class of securities may go unrecognized in a reorganization when . . . they have no investment value.") Pertinent here are the District Court's observations at the close of its opinion in *In re Imperial '400' National, Inc.*, 374 F. Supp. 949, 978 (D. N. J., 1974): "Concern has been expressed . . . with respect to the market value of new . . . stock as opposed to its investment value. No matter how carefully I may calculate 'value,' I have no control over what may happen to price in the public market. But my concern under the Bankruptcy Act is value and not price."

over time the securities markets are rational.[50] And if that premise be sound, an issue as well-known and as conspicuous as Du Pont common cannot remain on the bargain counter for long.[51]

Suppose that we were inclined to see more abstract merit than we do in the objectors' market impact argument. Even then we would be unable to give it much weight in deciding the concrete case before us. How can we possibly tell how much Du Pont common is likely to come to market by reason of this merger in 1976? 1980? 1985? And even if we could form some educated guesses about that, how would we measure the impact of the addi-

50. The premise may or may not be empirically demonstrable. Some academicians who speculate about the nature of speculation question it. But see the observations on "central value" and "intrinsic value" in GRAHAM, DODD & COTTLE, SECURITY ANALYSIS 26, et seq. (4th ed., 1962). We, however, are not at liberty to question it. The statutes we have been directed to administer start from the axiom that markets are or can be made economically rational. We are no freer to question that axiom than we are to question the desirability of registration statements and prospectuses under the Securities Act. If prices and values are as unrelated to each other over time as the objectors contend, the Investment Company Act is nonsensical and this Commission's labors under it farcical. For obvious reasons we take a different view.

51. The closed-end discount that pervades this case may raise doubts about this. The closed-end discount phenomenon, which is neither peculiar to Christiana nor of recent vintage (see our previously cited 1966 report on the PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH at pp. 42-44; see also Metz, *Unkindly Year in Closed Ends*, N. Y. Times, January 11, 1974 at 42, col. 3; *Where Stocks Can Be Bought at a Discount*, U. S. NEWS & WORLD REPORT, May 27, 1974, p. 61) has its intriguing and to some extent disquieting aspects. But we see nothing in it that serves as an augury about the probable market action of a stock like Du Pont. Closed-end companies are seldom liquidated. Investors attracted to them by the discount assume the risk that the discount may widen against them. And in Christiana's case special factors come into play. Du Pont is an active, well-known listed stock. Christiana, on the other hand, is a thinly traded over-the-counter issue. The *relative* illiquidity of an investment in Christiana would seem to have had some influence on the discount.

tional supply on the market price? The objectors are unable to supply us with supply and demand schedules for Du Pont common for the ensuing decade.[52] And we decline to construct our own.[53] Speculations about the probable behavior patterns of speculators are much too slender a reed on which to predicate findings of fairness under the Investment Company Act.[54]

Even if we had the light of hindsight available to us, we could not properly focus on the factors that the objectors consider central.

Suppose that we were able to take another look at this case some years after the merger. Du Pont's actual post-merger market history would then be available to us. But it would be of little help. Stock prices are volatile and the factors that influence them multifarious.[55] We know of nothing that would permit an accurate post-merger assessment. A pre-merger one would obviously be an even wilder guess.

52. Were there any such schedules, their very existence would alter the situation. If investors and speculators had the benefit of perfect foresight, they would alter their plans.

53. Having denounced investment advisers who "vie with each other in making unsupportable claims to prophetic insight" (*Spear & Staff, Incorporated*, 42 S. E. C. 549, 556 (1965)), we refrain from similar transgressions of our own.

54. Compare *Jade Oil & Gas Co.*, Corporate Reorganization Release No. 289, p. 14 (September 15, 1969).

55. Du Pont is generally regarded as an issue of prime investment quality. Applicants and objectors agree on that. Yet during 1974 its price has ranged from 179 to 84½. Lest 1974 be tossed off as an especially disturbed year, we look for comparative purposes to 1970-1972. And we find that during those years the price ranged from 184 to 92. Du Pont is now selling at 8 times earnings. Not too long ago it was selling at 24 times earnings. Some years ago it was at 27 times earnings. These numbers show the inherent futility of any effort to measure the impact of incremental supply. Yet objectors ask us to assess the psychological effects of purely potential supply.

XI.

At times the law undertakes explorations almost as speculative as those on which the objectors ask us to embark. Thus in the law of tort judges and juries place price tags on pain and suffering—and indeed on human life itself. And to come closer to home, in reorganizations under the Bankruptcy and Public Utility Holding Company Acts we and the courts try to estimate the probable future earnings of business enterprises and the multiples at which it is appropriate to capitalize those earnings.[56] Those inquiries are undertaken because justice requires that the effort be made.

That differentiates those situations from this one. Here justice requires no ventures into the unknown and unknowable. An investment company, whose assets consist entirely or almost entirely of securities the prices of which are determined in active and continuous markets, can normally be presumed to be worth its net asset value. What better guide to its value could there be? The simple, readily usable tool of net asset value does the job much better than an accurate gauge of market impact (were there one) could. The record indicates that most of Christiana's stock is held by long-term investors. Hence there is no pressing need to depart from the net asset value test.[57]

56. See *Consolidated Rock Products Co., v. Du Bois*, 312 U. S. 510, 526 (1941) quoted with approval in *Protective Committee v. Anderson*, 390 U. S. 414, 441-442 (1968): "The criterion of earning capacity is the essential one . . . Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made."

57. Investment companies are as a general rule media for long-term investment. That makes net asset value the touchstone. And the Act is based on that premise. Section 2(a)(41)(B) states that "'Value' with respect to assets of registered investment companies . . . means . . . with respect to securities for which market quotations are readily available, the market value of such securities."

That understates matters. In these circumstances, any significant departure from the net asset value criterion would work positive injustice. Objectors' proposals would strip the long-term Christiana investor of some of the intrinsic value of his holdings. Such expropriation would be wholly unjustifiable. It would also be most inappropriate to frustrate the reasonable expectations of those who bought into Christiana in the belief that it was a legitimate way of buying Du Pont at a lower price.[58]

XII.

Having concluded that pecuniary assessment of hypothetical future market impact would be unnecessary and inappropriate,[59] we turn to the objectors' suggestions for

57. (Cont'd.)
And although the closed-end discount phenomenon was well-known in 1940, the Congress that passed the Act chose to protect closed-end stockholders against dilution of intrinsic values rather than to facilitate the sale of new closed-end shares. Section 23(b) of the Act shows that. It provides that "No registered closed-end company shall sell any common stock of which it is the issuer at a price below the current net asset value of such stock." And we have viewed net asset value as the controlling factor in Section 17 proceedings. See, e.g., *Harbor Plywood Corporation*, 40 S. E. C. 1002, 1010 (1962); *Delaware Realty and Investment Company*, 40 S. E. C. 469, 473 (1961). Compare *Central States Electric Corporation*, 30 S. E. C. 680, 700 (1949) (advisory report on plans for the reorganization of a closed-end investment company under Chapter X of the Bankruptcy Act urging "net asset value as the primary measure of value of an investment company.").

58. Objectors talk of windfalls. We cannot detect them. True, people bought Christiana on the theory that it was a cheap way of buying Du Pont. But those who did that took the risk that the closed-end discount might widen against them. Those who reasoned that long-run value would win out in the end and that Christiana could not last forever will do well. But such rewards for astuteness and lucky guesses are inherent in the nature of markets.

59. Objectors make much of certain assertedly contrary positions said to have been taken by the applicants, their controlling persons and their counsel and financial advisers in the Du Pont-General Motors divestiture proceedings. See *United States v. E. I. du Pont*

restraints on the alienation of the Du Pont shares to be issued under the merger.[60]

The Securities Act is now 41 years old. Hence there is nothing novel about the idea that it is in the public interest and appropriate for the protection of investors to inhibit certain strategically situated persons from selling securities whenever and wherever they choose. But neither the Securities Act nor the Securities Exchange Act prohibits such people from selling. What those statutes prohibit are offers and sales without appropriate disclosure. It is a long, long jump from that to an unconditional ban on any sales at all. And quantitative limits on a holder's freedom of sale that rest not on the buyers' need for disclosure, but on the assumed desirability of protecting other holders from the market effects of large-scale selling would entail almost as broad a leap. We see no need for such a leap in this case.[61]

59. (Cont'd.)
de Nemours & Co., 353 U. S. 586 (1957); 177 F. Supp. 1 (N. D. Ill., 1959); 366 U. S. 316 (1961). But the views that the applicants found it convenient to take in another case under another statute before another forum are not controlling here. Moreover, the General Motors situation had nothing in common with this one. There Du Pont was to distribute its millions of General Motors shares to Du Pont's stockholders. Under the Internal Revenue Code, as it then was, the recipients of those shares would have been deemed to have realized taxable income. So they would have had to pay taxes. To raise the money with which to pay those taxes, they would or might have had to sell at least some of the General Motors shares that they received by reason of the divestiture. (This problem was solved for the most part by the addition of Section 1111 to the Internal Revenue Code.) Here no taxes need be paid except by those Christiana holders who may voluntarily decide to sell. Nor are the governing legal standards the same. The Internal Revenue Code's standard is "fair *market* value." The word "market" is conspicuously absent from Section 17(b).

60. No specific suggestions are made.

61. Objectors seek to protect their property rights. But the Christiana stockholders also have property rights. It is not for us to prefer one group's property rights over the other's. The Du Pont

XIII.

We said earlier that this is not an easy case. But its difficulties do not stem from the hypothetical market impact on which objectors focus. They flow rather from the striking disparity between the substantial benefits to be received by Christiana and the far more modest ones inuring to Du Pont. This disparity justifies the proposed 2.5% or 1.8% discount from Christiana's net asset value. That is not to say that applicants have come up with *the* one right figure. There is no such figure. Fairness is a range, not a point. Something less than the discount arrived at by the applicants might well pass muster.[62] And a slightly higher discount would also be within the permissible range. But one appreciably higher than the discount now before us

61. (Cont'd).
stockholders are far more numerous than the Christiana stockholders. See n. 34 on p. A52, *supra*. But that is of no consequence. These matters are not resolved by plebiscite. Section 17(b)(1) seeks to prevent "overreaching on the part of any person concerned." Compare *Protective Committee v. Anderson*, 390 U. S. 414, 435 (1968): "[A] plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it."

62. Objectors say that the applicants' negotiations were not at arm's-length. And in view of the links between Christiana and Du Pont they may well be right about that. It matters not. In assessing fairness we look not to the nature of the negotiations but to their results. It is precisely because transactions of this character are replete with inherent conflicts of interests that the Act requires that they be submitted to us. As we said in *Atlas Corporation*, 37 S. E. C. 72, 85-86 (1956): "It is evident that Section 17 of the Act was not designed to prohibit transactions solely for the reason that they are not negotiated at arm's-length. On the contrary, Section 17(b) of the Act directs us to exempt transactions between controlling or affiliated persons where the evidence establishes that the terms thereof are reasonable and fair and do not involve overreaching on the part of any person concerned. Clearly, Section 17 contemplates that transactions meeting these standards will be permitted although arm's-length bargaining may not have been present or, indeed, may have been impossible in view of the relationship of the parties."

would divest Christiana's stockholders of a significant portion of the intrinsic investment values to which they are legally and equitably entitled. It would therefore run afoul of Section 17(b)(1) of the Act.[63]

XIV.

We find the proposed merger:

(A) Reasonable and fair;

(B) Free from overreaching on the part of any person concerned;[65] and

(C) Consistent with the general purposes of the Act.[66]

63. That being our view of the law of the case, we see no merit to the objectors' contention that the record is so inadequate on the market impact aspect of the matter as to require a remand. Nor do we see any basis for the claim that adequate discovery about the Christiana control group's present intent to sell or refrain from selling in the future was improperly denied. To have delved into the matters into which objectors sought to inquire would have swelled the record pointlessly. Moreover, our Rules of Practice make no provision for the taking of depositions in situations other than those covered by Rule 15(a) of those rules. There may be a trend toward liberality in pre-trial discovery. But that did not empower the administrative law judge to disregard the plain meaning of our rules. Due process does not require depositions. See *Miner v. Atlass*, 363 U. S. 641 (1960); *N. L. R. B. v. Interboro Contractors, Inc.*, 432 F. 2d 854, 857-858 (C. A. 2, 1970), *cert. denied*, 402 U. S. 915 (1971).

65. We made no findings under Section 17(b)(2), which requires that the proposed transaction be consistent with the investment company's policy. That section has no bearing on cases in which investment companies propose to go out of existence. See *Aviation and Transportation Corporation*, 8 S. E. C. 527, 538-539 (1941).

66. That is so because it will eliminate pyramiding duplicative operating expenses, and unnecessary taxation. See the *Aviation and Transportation* case cited in the preceding footnote, at page 539 of 8 S. E. C.

The standards of Section 17(b) being met, there is no need to invoke Section 6(c).[67]

An appropriate order will issue.

By the Commission (Chairman GARRETT and Commissioners LOOMIS, EVANS, SOMMER and POLLACK).

GEORGE A. FITZSIMMONS,
Secretary.

67. Applicants also pray for exemption relief from Section 17(d) of the Act and our Rule 17d-1 thereunder. No issue has been raised as to the applicability of those provisions. Hence we assume without so deciding that they may have some bearing here. To the extent, if any, that this is so, we find the standards of that section and that rule satisfied.

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Rel. No. 8615/December 13, 1974

Admin. Proc. File No. 3-3928

In the Matter of
CHRISTIANA SECURITIES COMPANY
Wilmington, Delaware

E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware
(812-3224)

ORDER GRANTING APPLICATION.

Christiana Securities Company, a registered closed-end non-diversified investment company, and E. I. du Pont de Nemours and Company, its affiliate, made joint application under Sections 17(b) and 6(c) of the Investment Company Act for an exemption from Section 17(a) of certain transactions incident to a merger of Christiana into Du Pont. The application also sought permission to effect such transactions under Section 17(d) and Rule 17d-1.

Hearings were held after appropriate notice. An initial decision by the administrative law judge was waived. Proposed findings and briefs were filed. And the Commission heard oral argument.

The Commission has this day issued its Findings and Opinion. On the basis of such Findings and Opinion, it is

ORDERED that the proposed transactions be, and they hereby are, exempted from Section 17(a) of the Investment Company Act; and it is further

ORDERED that said transactions be, and they hereby are, exempted from Section 17(d) of that Act and from Rule 17d-1 thereunder.

By the Commission.

GEORGE A. FITZSIMMONS,
Secretary.

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Rel. No. 8692/February 27, 1975

Admin. Proc. File No. 3-3928

In the Matter of
CHRISTIANA SECURITIES COMPANY
Wilmington, Delaware

E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware
(812-3224)

MEMORANDUM OPINION AND ORDER DENYING REHEARING AND LEAVE TO ADDUCE ADDITIONAL EVIDENCE.

PRACTICE AND PROCEDURE

Rehearing

Petitions for rehearing, *denied*, because they raised nothing new and did not convince the Commission that prior result was erroneous.

Additional Evidence—Leave to Adduce

Application for leave to adduce additional evidence in support of a factual hypothesis that the Commission had already accepted but had held irrelevant under governing legal standards, *denied*.

APPEARANCES:

Lewis C. Murtaugh, of Murtaugh & King, *pro se*.

Richard J. Collins, Jr., pro se.

Kenneth W. Gemmill, Stephen R. Miller, Matthew J. Broderick and *Richard S. Seltzer*, of Dechert, Price & Rhoads, for Christiana Securities Company.

Daniel M. Gribbon, Cyril V. Smith, Jr. and *Peter B. Archie*, of Covington & Burling, for E. I. du Pont de Nemours and Company.

Gerald Osheroff, for the Commission's Division of Investment Management Regulation.

I.

The objecting shareholders whose contentions were rejected in Investment Company Act Release No. 8615 (December 13, 1974), 5 SEC Docket 745 seek rehearing. But their petitions raise nothing of substance that is new.[1] Nor do they convince us that our original decision was wrong.

II.

One objector also asks for leave to adduce additional evidence. That consists of:

(A) Seven specifically identified documents that could, he suggests, "aid . . . a court on review and . . . help them [sic] visualize the factual situation and various publicized statements and the interrelationships"; and

1. That is so even though the principal petitioner received an unprecedentedly generous extension of time to enable him to perfect his petition. He told us that such extension was needed because of the complexity of the case. Agreeing that an extension was appropriate, we granted his request over the applicant companies' strenuous objections.

(B) Unspecified materials said to have been discovered in a pending shareholder's derivative action.

Petitioner does not contend that the identified documents are material.[2] As already noted, he states only that they might "help" a reviewing court to "visualize the factual situation." But how would they do that? Petitioner doesn't say.[3]

The unidentified evidence said to have been gathered in the derivative action goes to petitioner's market impact contentions. Petitioner wants to show that the proposed merger will lead to massive sales of Du Pont's common stock and that this *"goes right to the fairness issue."* (Emphasis his.) But we have already said in our opinion that: "We assume that the merger may engender some selling that would otherwise not take place. We assume further that such selling may at certain points in time be substantial."[4] So petitioner wants to adduce additional evidence in support of a hypothesis that we have already accepted on the record as it stands. No showing has been made that such additional evidence would serve any useful purpose.

2. They consist of three notices of annual meetings, a proxy statement with respect to one of those meetings, one of Christiana's semiannual statements, a report by Christiana to us on our Form N-1R, and another company's annual report. Four of these documents were available when the hearings were held. Petitioner claims to have discovered "most of this material" after the close of the hearings herein. But in view of their nature and ready accessibility it seems to us that petitioner would have learned of these papers earlier—had he been reasonably diligent. Most of the documents are in our public files and hence available to anyone who wants to look at them.

3. With respect to only a single document does the petitioner state what he wants to show through it. He says in effect that it shows that the applicant companies are under common control. We have already held that this is so. Release at p. 6, 5 SEC Docket at 752.

4. Release at p. 19, 5 SEC Docket at 750.

Petitioner's argument that the projected selling "goes right to the fairness issue" is legal, not factual. We rejected that argument because we think such selling irrelevant to the fairness issue framed by the Investment Company Act. That holding does not turn on evidentiary details. It rests on our reading of the Act.[5] Hence additional evidence cannot alter the result.[6]

We conclude that the instant application does not meet the test prescribed by Rule 21(d) of our Rules of Practice, which requires that an application for leave to adduce additional evidence "show . . . that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence . . . before . . . the hearing officer."[7]

III.

Accordingly, IT IS ORDERED that the petitions for rehearing and the petition for leave to adduce additional evidence be, and they hereby are, in all respects denied.

By the Commission (Chairman GARRETT and Commissioners LOOMIS, EVANS, SOMMER and POLLACK).

GEORGE A. FITZSIMMONS,
Secretary.

5. In footnote 38 to our opinion (Release at p. 14, 5 SEC Docket at 754) we said that "the questions presented are in our view essentially legal."

6. Petitioner recognizes this. He says in his petition: "Reading the opinion of the Commission leaves the impression that there is no fact question that could move the Commission to abandon the legal rulings which seem to preclude and indeed preempt factual issues . . . there is little that can be done by way of evidence."

7. *Cf. Gross v. S. E. C.*, 418 F. 2d 103, 108 (C. A. 2, 1969).

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D. C. 20549

—

Application File No. ————

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
AND
E. I. DU PONT DE NEMOURS AND COMPANY

Investment Company Act of 1940

Sections 17(a), 17(b), 17(d), 6(c) and 8(f)

Christiana Securities Company (Christiana) and E. I. du Pont de Nemours and Company (Du Pont), both of which are sometimes collectively referred to hereinafter as "Applicants" and each of which is a Delaware corporation having its principal office in the City of Wilmington, State of Delaware, hereby make application pursuant to Sections 17(b) and 17(d), including Rule 17d-1 thereunder, and 6(c) of the Investment Company Act of 1940 (the Act) for an order exempting from the prohibitions of Sections 17(a) and 17(d) of the Act the proposed transaction described herein, whereby Christiana would merge into Du Pont. As a result, Du Pont would acquire all of the assets of Christiana, consisting principally of Du Pont common stock, and the outstanding capital stock of Christiana would be converted into Du Pont common stock. Application is also hereby made under Section 8(f) of the Act for deregistration of Christiana, as indicated below.

Christiana, a registered investment company of the closed-end, nondiversified, management type, owns approximately 28.3% of the outstanding common stock of

Du Pont. Under Section 2(a)(9) of the Act, Du Pont is presumed to be controlled by Christiana and, under Section 2(a)(3) of the Act, Applicants are affiliated persons of each other. Moreover, as indicated below, certain directors, officers and other affiliated persons of Applicants are stockholders of Christiana or Du Pont or both companies. Therefore, it may be said that the proposed transaction would be in violation of Sections 17(a) and 17(d) of the Act unless an order of exemption is issued under Sections 17(b), 17(d) and 6(c) of the Act.

Synopsis of Proposed Merger Transaction

The proposed merger transaction is of such nature as to require evidence to demonstrate that the terms thereof (1) are reasonable and fair and do not involve overreaching on the part of any person concerned and (2) are on a basis that is not less advantageous for some of the participants than for others similarly situated.

Christiana has a limited portfolio of only four investments, of which one—a large block of Du Pont common stock—represents 98% to 99% of the total value of Christiana assets. In effect, Christiana common stock represents an interest, indirectly, in Du Pont common stock.

Christiana common stock is traded in the over-the-counter market in only limited quantities, and its market price consistently has been less than the market value of Christiana's underlying net assets. Over the past two years this market price discount has been in the range of 20% to 25%. Substantially all of Christiana's income consists of dividends on Du Pont stock, subject to tax at a current effective rate of 7.2%.

From time to time, Christiana has considered various means by which Christiana stockholders could be relieved of the foregoing disadvantages. In view of Federal tax

considerations discussed below, the only feasible method available to Christiana to achieve this objective is a tax-free merger into Du Pont. Accordingly, Christiana proposed to Du Pont that such a merger be considered.

Du Pont agreed to consider such a merger because of the possible advantages to it. Some corporate simplification would be achieved and there would be a broader market for Du Pont common stock by reason of the dispersion of the large single block of Du Pont common held by Christiana. In addition, considering the potential advantages to Christiana, Du Pont anticipated that it could obtain some financial benefit from the merger to provide Du Pont, overall, sound business reasons for the merger and an attractive proposal to present to its approximately 225,000 common stockholders (including some 60,000 Du Pont employees) for consideration.

Five directors of Du Pont also are directors of Christiana, and seven additional Du Pont directors own shares of Christiana common stock. These circumstances, together with the fact that Christiana is a major stockholder of Du Pont, indicated need for (1) all practicable safeguards to foster arm's-length bargaining and (2) extraordinary effort to be made to assure that the merger terms would be fair and reasonable for all parties affected. Accordingly, Applicants proceeded as follows—

1. Christiana and Du Pont each appointed a special committee of its Board to negotiate and submit recommendations with respect to the proposed merger. In the case of each company, the special Board committee consisted of two directors with no director, officer or employee relationship with the other company.
2. The special Board committees engaged investment banking firms as financial advisors to make inde-

pendent studies and recommendations regarding a suitable range of merger terms—Morgan Stanley & Co. to advise Applicants jointly in such respect; Kidder, Peabody & Co. Inc. to advise Christiana separately; The First Boston Corporation to advise Du Pont separately.

3. It was determined that Du Pont directors who also are directors of Christiana, as well as Du Pont directors who own Christiana stock, should not participate in discussion and decision of the Du Pont Board regarding the merger proposal.

Negotiations by the special Board committees were conducted with due consideration of the recommendations made by the financial advisors regarding ranges of merger terms they would consider fair and reasonable, and resulted in proposal by the special Board committees for a merger with terms thereof based on 97½% (i.e., a discount of 2½%) of Christiana's adjusted° net asset value. The proposed merger plan has been approved in principle by the Boards of each of the companies.

The 2½% discount as a basis for merger terms falls within the range recommended by each of the financial advisors, and each has expressed the opinion that the resultant merger terms are fair and reasonable for all parties affected. The effective rate of discount to be borne by Christiana stockholders, net of the portion of the discount they will recapture by reason of becoming direct stockholders of Du Pont, is 1.8%.

° As discussed hereinafter, certain of Christiana's assets, for the reasons indicated, have value to Du Pont lower than the amount reflected for such assets in determining the net asset value of Christiana. Christiana's net asset value was adjusted to reflect such assets at their value to Du Pont to arrive at an adjusted net asset value for purposes of determining the terms of the proposed merger.

The proposed merger terms are such as to provide Christiana stockholders shares of Du Pont common stock with current market value equal to 97½% of Christiana's adjusted net asset value in exchange for their Christiana shares. Each Christiana preferred share will be converted into Du Pont common stock having a market value of $120—the preferred call price. Each Christiana common share will be converted into 1.123 shares of Du Pont common stock and a contingent right upon settlement of a Christiana tax claim.

The following table summarizes selected data from Exhibit F regarding the effect of the proposed merger on stockholders of Christiana and Du Pont:

	% Increase (Decrease)		
	Christiana		*Du Pont*
	Common	*Preferred*	*Common*
Market value of security holdings	10.5%) 25.4 } °	20.0%	—
Dividend income	7.0	(47.7)	—
Earnings applicable to security holdings	75.8	—	0.4%

° Percent increase of 10.5% is based on market price discount for Christiana common prevailing at July 14, 1972, the last trading day before the date on which the proposed merger was approved in principle by Applicants' Boards; percent increase of 25.4% is based on such discount at April 28, 1972, the date on which merger discussions were announced.

Comprehensive description of the proposed merger transaction is in the following sections of this application.

Description of Christiana and Du Pont

Data regarding capitalization and stockholders of Christiana at June 30, 1972 are shown in the following tabulation:

Capital stock outstanding:	
7% cumulative, nonvoting preferred, $100 par value—106,500 shares	$10,650,000
Common, $1.25 par value—11,710,103 shares	14,637,629
Total	25,287,629
Earned surplus	70,086,421
Total capitalization	$95,374,050
Number of stockholders:	
Preferred	1,516
Common	6,683

The Christiana preferred stock is callable at $120 a share and is entitled to $100 a share in event of liquidation.

Security holdings of Christiana and book and market values thereof at July 17, 1972 (the date on which Applicants' Boards of Directors approved in principle the proposed plan of merger) are shown below:

No. of Shares	*Security*	*Value of July 17, 1972* Book Value	Market Value
13,417,120	Du Pont, Common	$74,621,915	$2,198,730,540*
16,256	Du Pont, $4.50 Pfd.	1,298,056	1,124,102*
69,216	Wilmington Trust Co., Common	903,592	2,699,424**
7,460	News-Journal Co., Common	846,107	24,260,000***
	Total	$77,669,670	$2,226,814,066

* Based on average closing prices on the New York Stock Exchange on July 10 through 14, inclusive.

** Based on average closing bid prices in the local over-the-counter market on July 10 through 14, inclusive.

*** Indicated fair market value based on appraisal by an expert in the field.

Du Pont stock held by Christiana represents 28.28% of the outstanding Du Pont common shares and .96% of the outstanding Du Pont $4.50 preferred shares. Wilmington Trust Co. stock held by Christiana represents 3.45% of the outstanding shares. The News-Journal Co. is wholly-owned by Christiana.

In addition to the security holdings listed above, Christiana has other assets consisting, at June 30, 1972, of (1) cash and cash equivalents, less current liabilities, in the net amount of $5,981,367 and (2) a claim for refund of Federal income taxes and interest, carried on the books as a deferred charge in the amount of $11,723,013. The claim for tax refund, amounting to approximately $21 million, principally involves a controversy as to the fair market value for Federal income tax purposes of the very large blocks of General Motors common stock received by Christiana in 1962, 1964 and 1965 as a result of the General Motors divestiture distribution by Du Pont.

Du Pont is a large industrial company engaged principally in manufacturing and selling diversified lines of chemical products and other products related thereto. Data regarding capitalization and stockholders of Du Pont at June 30, 1972 are shown in the following tabulation:

Capital stock outstanding:	
Preferred stock, without par value—cumulative:	
$4.50 Series—1,688,850 shares	$ 168,885,000
$3.50 Series— 700,000 shares	70,000,000
Common stock, $5 par value—47,566,594 shares (includes 120,784 Treasury shares)	237,832,970
Total	476,717,970
Amount paid-in, in excess of par or stated value	215,165,271
Reinvested earnings	2,512,791,463
Total capitalization	$3,204,674,704
Number of stockholders:	
Preferred—$4.50 Series	13,902
Preferred—$3.50 Series	4,854
Common	224,964

CIRCUMSTANCES LEADING TO MERGER STUDY

Market value of the large block of Du Pont common shares held by Christiana represents some 98% to 99% of the current value of Christiana's total assets and virtually all of Christiana's gross income consists of dividends paid on these Du Pont common shares. Over the years, there has been virtually no turnover in Christiana's portfolio, and Christiana has consistently followed the practice of declaring dividends on its common stock in an amount nearly equal to its net earnings per share of common stock. Thus, a holding of Christiana common stock represents essentially a holding, indirectly, of Du Pont common stock.

The common stockholders of Christiana could realize certain advantages by holding their interest in Du Pont directly, in the form of Du Pont common stock, rather than indirectly via ownership of Christiana common stock, as follows:

1. *Market value of the securities held would tend to reflect their full intrinsic value*—Christiana common stock has traditionally traded at a discount compared to the market value, at then current prices, of the net assets underlying the Christiana common stock. Over the past two years this discount generally has been in the range of 20% to 25%—and was 23% on April 28, 1972, when it was announced publicly that a possible merger would be considered. With the Christiana interest in Du Pont held directly by Christiana stockholders via ownership of Du Pont common, this market price discount would be eliminated.

2. *Securities held would be more readily marketable*—Christiana common stock is traded in limited volume in the over-the-counter market. Du Pont common stock has a broad quoted market on the New York Stock Exchange and more limited markets on other exchanges. In the first six months of 1972 weekly trading volume averaged approximately 87,000 shares for Du Pont common and only about 5,500 shares for Christiana common.

3. *Income would be increased*—Dividends paid by Du Pont to Christiana must be reduced by the Federal intercorporate dividend tax (currently at an effective rate of 7.2%) and other (relatively minor) operating expenses of Christiana before they can be passed on by Christiana to the Christiana stockholders.

Christiana has explored various possible means to achieve the foregoing advantages through methods that would eliminate Christiana as a corporate entity, or operate to reduce the magnitude of its security holdings, and place the Christiana holdings of Du Pont stock, or at least a substantial portion thereof, directly in the hands of the Christiana stockholders. The principal methods considered are described below:

1. *Exchange Plan*—A plan under which Christiana would offer its holdings of Du Pont stock in redemption of Christiana common stock was considered. Such an exchange plan is not practicable because it would require Christiana to pay substantial capital gains tax.

2. *Liquidation*—Stockholders of a company in an ordinary liquidation are subject to Federal tax at capital gains rates on the difference between the fair market value of the assets they receive and the tax basis of their security holdings in the liquidated company. In a so-called "one-month liquidation" under Section 333 of the Internal Rev-

enue Code, however, the stockholders incur an immediate tax only with respect to the portion of such gain that is not in excess of the company's accumulated earnings and profits as calculated for Federal tax purposes. Considerable attention was given to this possibility, but it was ultimately determined that a liquidation under Section 333 would not be feasible for Christiana.

3. *Tax-free Merger of Christiana into Du Pont*—Christiana concluded that this alternative is the only method reasonably available to it to achieve the objectives discussed above.

Christiana initiated the current merger discussions, stating the belief that (1) benefits from realizing improvement in market value and marketability of security holdings and elimination of intercorporate tax on Du Pont dividends may now outweigh the benefits derived from the holding of a large block of Du Pont stock by Christiana, and (2) a merger might be practicable on terms that would be favorable to both Christiana and Du Pont and the stockholders of both companies.

Christiana's proposal to consider a merger is of interest to Du Pont principally because it presents a possible opportunity for Du Pont to acquire the substantial block of Du Pont common now held by Christiana at a moderate discount from current market price in exchange for new Du Pont common shares valued at current market price, with resultant modest increase in Du Pont's earnings per common share. The merger also would provide advantage to Du Pont from (1) dispersion into some 8,000 separate holdings of the large single block of Du Pont common long held by Christiana, and (2) some corporate simplification (e.g., Du Pont no longer would be required to obtain prior exemption orders under the Investment Company Act of

1940 before undertaking certain types of commercial transactions).

DEVELOPMENT OF MERGER PROPOSAL.

Applicants have determined that there are mutual benefits to be gained from a merger, and Applicants have agreed to merge. The Board of Directors* of each of the companies has approved in principle a plan of merger on the terms described in this application and set forth in the draft Agreement and Plan of Reorganization attached hereto as Exhibit A.

Merger negotiations were structured with a view to ensuring, as completely as practicable, that the terms of any agreement to merge would be the result of arm's-length bargaining and free of conflicts of interest. Particular care in this respect was considered necessary not only because Christiana is a major stockholder of Du Pont, but also because five** of the eleven directors of Christiana are also directors of Du Pont and seven additional Du Pont directors are Christiana stockholders. Moreover, most of the Christiana directors own Du Pont stock.

Applicants' Boards of Directors each designated a special Board committee consisting of two of its members to negotiate and submit recommendations with respect to the merger. Christiana appointed to its committee Mr. A. Felix du Pont, Jr., a Vice President and director of Christiana, and Mr. Edward B. du Pont, an Assistant Treasurer and director of Christiana; neither of these persons has any director, officer or employee relationship with Du Pont. Du Pont appointed to its committee Mr. Charles

* Du Pont directors who also are directors of Christiana, as well as those who own Christiana stock, did not participate in discussion and decision of Du Pont's Board regarding the merger proposal.

** Walter S. Carpenter, Jr., Lammot du P. Copeland, Irénée du Pont, Jr., George P. Edmonds and Crawford H. Greenewalt.

B. McCoy, Chairman of the Board and President of Du Pont, and Mr. Irving S. Shapiro, a Senior Vice President and director of Du Pont; neither of these persons has any director, officer or employee relationship with Christiana.

Applicants considered it desirable that extraordinary effort be made to assure that the terms of any agreement to merge would be fair and reasonable for all parties affected. Accordingly, Applicants engaged independent financial advisors, none of which has an affiliation with either of the parties, to provide advice and guidance regarding the terms of the merger, as follows:

1. Morgan Stanley & Co., which firm is familiar with Du Pont and Christiana and has advised both companies on financial matters for a number of years, was engaged jointly by Applicants to advise both Du Pont and Christiana regarding appropriate merger terms. Report on the matter submitted to both Du Pont and Christiana by Morgan Stanley & Co. is attached as Exhibit B.
2. Kidder, Peabody & Co. Incorporated was engaged by Christiana to advise Christiana separately regarding appropriate merger terms. Report on the matter submitted to Christiana by Kidder, Peabody & Co. Incorporated is attached as Exhibit C.
3. The First Boston Corporation was engaged by Du Pont to advise Du Pont separately regarding appropriate merger terms. Report on the matter, and subsequent letter dated July 7, 1972 regarding the proposed merger terms, submitted to Du Pont by The First Boston Corporation are attached as Exhibit D.

A variety of factors that might be pertinent with respect to merger terms was considered by the independent financial advisors in their studies, as outlined in their reports, and by the special Board committees in the course of negotiations. But attention ultimately centered mainly on—

1. whether Christiana stockholders should receive Du Pont common stock with current market value equal to the current market value of Christiana's underlying net assets, or some lesser (or greater) amount to reflect a discount (or premium) from such net asset value; and
2. the volume of Du Pont common shares that could flow to Christiana stockholders without diluting Du Pont's financial position (earnings per share; dividends per share; etc.)—and, alternatively, the volume that could so flow and result in some modest improvement in Du Pont earnings per share.

The independent financial advisors recommended ranges of basic merger terms that they would consider fair and reasonable. Their recommendations with respect to basic merger terms, expressed in terms of % discount (or premium) from Christiana's adjusted net asset value, are summarized below:

	Recommended Range of Discount (or Premium)
Morgan Stanley & Co.	½% discount to 2½% discount
Kidder, Peabody & Co. Inc.	2% premium to 3% discount
*The First Boston Corporation	1.1% discount to 3.7% discount

* First Boston recommendation is stated in terms of the primary merger ratio (i.e., the number of Du Pont common shares to be exchanged for each Christiana common share). This tabulation reflects such recommendation translated to the equivalent in terms of % discount from Christiana's adjusted net asset value.

The special Board committees of Du Pont and Christiana had discussion with all of the financial advisors regarding the scope of their studies, factors considered, and ranges of merger terms they considered fair and reasonable. The special Board committees each received copies of the reports of each of the financial advisors. Merger negotiations then were undertaken by the special Board committees and agreement was reached that Christiana's adjusted net asset value should be discounted 2½% for purposes of the merger. Thus, the proposed merger terms are such as to provide Christiana stockholders shares of Du Pont common stock with current market value equal to 97½% of Christiana's adjusted net asset value in exchange for their Christiana shares. However, Christiana stockholders will have reduction of their equity interest only to the extent of about 72% of the amount of discount of Christiana's adjusted net asset value reflected in the merger terms—see below:

	Amount (dollars in millions)	*% of Adjusted Net Asset Value*
Discount reflected in merger terms	$55.6	2.5%
Portion recaptured by Christiana stockholders by reason of becoming holders of Du Pont	15.6	.7
Net reduction of equity	$40.0	1.8%

The Du Pont special Board committee considered merger terms reflecting a 2½% discount of Christiana's adjusted net asset value fair and reasonable for all parties affected, and appropriate in the circumstances to provide—

1. sound business reasons for Du Pont to undertake the merger and a basis for presenting to the approximately 225,000 Du Pont common stockholders (including some 60,000 Du Pont employees who are stockholders) a proposal that the stockholders, generally, would consider attractive and worthy of a favorable vote, and
2. some protection against the risk of possible loss to Du Pont upon sale of the News-Journal Company (see discussion on page A98).

The Christiana special Board committee considered such merger terms fair and reasonable for all concerned, in view of the significant benefits to the Christiana stockholders which would result from the merger and which are not realizable by Christiana in any other way.

The proposed merger terms fall within the range recommended by each of the independent financial advisors and each such advisor has stated the opinion that the proposed terms are fair and reasonable.

Adjusted Net Asset Value of Christiana

The net asset value of Christiana as used for purposes of the proposed merger is as follows:

Security holdings (see page A86 above)	$2,226,814,066
Cash and cash equivalents, less current liabilities	5,981,367
Deferred charge-claim for tax refund	11,723,013
Total net asset value	$2,244,518,446

This net asset value is computed on the same basis as the net asset value data reflected in Christiana's annual report to the Securities and Exchange Commission on Form N-1R,

except that security holdings are stated at market prices as indicated on page A86 and Christiana's cash and equivalents, less current liabilities, are stated as of June 30, 1972 —in accordance with agreement by Applicants as to methods of valuation for purposes of the proposed merger.

As discussed below, certain of Christiana's assets will not have value to Du Pont equal to the amount at which they are reflected in computing the net asset value of Christiana shown in the foregoing tabulation. Adjustments have been made to reduce such assets to their value to Du Pont in arriving at an adjusted net asset value of Christiana to be used for the purpose of determining the terms of the proposed merger.

Claim for Tax Refund

Christiana and Du Pont know of no reasonable method to determine at this time the fair value of Christiana's tax claim, because there is no way of predicting the amount, if any, that will ultimately be recovered with respect thereto. Therefore, the merger terms contemplate that the tax claim, together with $1,000,000 of Christiana's cash to be reserved to cover expenses to pursue the claim, will be treated at the time of the merger as having no value. The tax claim and related cash reserved for expenses will become the property of Du Pont on the effective date of the merger, but a Tax Claim Committee, consisting of the present directors of Christiana and successors thereof elected by those remaining in office to fill any vacancies, will be established to manage, with assistance of counsel and on behalf of the former Christiana common stockholders, matters pertaining to pursuit of the tax claim. Du Pont will not participate in decisions regarding litigation or other developments with respect to the tax claim. The Tax Claim Committee will have complete responsibility for all such decisions and full authority to dispose of the tax claim in any manner that it deems to be in the best interests of the former Christiana common stockholders.

Du Pont will use the funds reserved for expenses for payment of expenses incurred by the Tax Claim Committee. Upon settlement of the tax claim, any residue of such funds, together with funds equivalent to net proceeds from settlement of the tax claim, will be converted into Du Pont common stock having corresponding value and such shares will be delivered to an Agent appointed for the purpose. The Agent will distribute these additional shares of Du Pont common stock pro rata to the former Christiana common stockholders in proportion to the Du Pont common stock received by them in the merger transaction. The price for Du Pont common stock to be used for the foregoing conversion will be the average of the closing prices for Du Pont common on the New York Stock Exchange for the ten trading days preceding the date on which refund payment by the Government is received by Du Pont or, if no refund is to be received, the date on which judgment to that effect becomes final.

Any additional Du Pont shares must be delivered within five years from the effective date of the merger. If the tax claim is not settled within that period, Du Pont will negotiate in good faith with the Tax Claim Committee during the final 45 days of the five-year period to determine the then fair value of the claim. If agreement as to such fair value is reached, a distribution of additional Du Pont shares based thereon will be made at that time. If Du Pont and the Tax Claim Committee are unable to agree at that time on the fair value of the claim, the additional distribution will be deferred until ultimate settlement of the claim, and then be made in cash.

Cash and Cash Equivalents

As mentioned above, the merger terms contemplate that $1,000,000 of Christiana's cash will be reserved to cover expenses to pursue the tax claim. Also, both Christiana and Du Pont will incur certain expenses in connection with the proposed merger, estimated to total $1,500,000 as indicated below:

Professional fees (legal, financial advisors, etc.)	$1,150,000
Printing, mailing, etc.	350,000
	$1,500,000

The special Board committees have agreed that it would be equitable for Christiana and Du Pont to share the total estimated merger expenses equally. Accordingly, the net asset value of Christiana's cash and cash equivalents has been adjusted for purposes of the merger to reflect the reservation of the $1,000,000 related to the tax claim and $750,000 related to merger expenses.

Wilmington Trust Company and News-Journal Stock

Wilmington Trust Company is the trustee for the Du Pont pension fund and the Du Pont thrift plan and, in any event, Du Pont has no interest in maintaining an investment in bank stock. The News-Journal Co. publishes the only daily newspapers in Wilmington, Du Pont's headquarters city. Therefore, it is intended that Du Pont will hold these two investments for only the period required for orderly disposition thereof.

Based on data supplied by the financial advisors, the special Board committees estimated that expenses of disposal of the Wilmington Trust stock would amount to 3% of market value; the net asset value of this holding was adjusted for purposes of the merger to reflect this estimate.

No such selling expense with respect to the News-Journal is anticipated. The net asset values of the Wilmington Trust and News-Journal holdings were also adjusted for purposes of the merger to reflect a tax of 30% on the capital gains that would result from their sale at the values reflected for such assets for purposes of the merger.

Mr. Vincent J. Manno, an expert in the newspaper field, was engaged to appraise Christiana's holdings of the News-Journal; a copy of his appraisal is attached hereto as Exhibit E. Du Pont believes that it will have risk of possible loss upon sale of the News-Journal Co., considering that (1) potential buyers may not be willing to meet a sale price reflecting substantially full earnings potential, as anticipated by Mr. Manno, (2) conditions prevailing at the time of sale will have effect on the sale price obtained, and (3) Du Pont will have need to be selective, in the light of its overall community interests, to assure sale to a fully responsible buyer.

Total Adjustments

The adjustments described above may be summarized as follows:

Total Net Asset Value of Christiana (see page A95, above)	$2,244,518,446
Less Adjustments:	
Adjustment to reflect tax claim at no value	11,723,013
Distribution cost for Wilmington Trust (3% of market value)	80,983
Capital gains tax @ 30% on sale of:	
Wilmington Trust (tax basis = $903,592)	514,455
News-Journal (tax basis = $846,107)	7,024,168
Merger expenses (50% of estimated total expenses)	750,000
Cash reserved for tax claim expenses	1,000,000
Adjusted Net Asset Value of Christiana	$2,223,425,827

DESCRIPTION OF TRANSACTION.

The proposed plan of merger contemplates that the transaction will take the form of a statutory merger. On the effective date of the merger both classes of Christiana stock—preferred and common—will be converted into Du Pont common stock at the rates specified in the agreed-upon merger terms. The merger agreement will provide (as discussed above) that the holders of Christiana common on the effective date of the merger are contingently entitled to additional shares of Du Pont common stock upon ultimate settlement of the pending Christiana claim for tax refund.

The shares of Du Pont common used for the merger will be newly issued shares. The shares of Du Pont common and Du Pont $4.50 Preferred received from Christiana in the merger will be retired.

Christiana stockholders will be requested to surrender their certificates for Christiana stock in exchange for certificates for an appropriate number of Du Pont common shares. Dividends payable on Du Pont common after the effective date of the merger will not be paid with respect to any Du Pont shares represented by Christiana certificates not yet surrendered for exchange. Du Pont will hold funds for such dividends for payment when the Christiana certificates are surrendered.

No fractional shares of Du Pont common will be issued to the Christiana stockholders. Instead, Christiana stockholders having a fractional interest in a share of Du Pont common will be provided an opportunity, through an Agent appointed for such purpose, to (1) sell such interest or (2) purchase the additional fractional interest required to make up one full share.

Each of the independent financial advisors recommended that the Christiana preferred stockholders receive

Du Pont common shares with current market value equal to $120 per preferred share (the call price for the preferred) in exchange for their preferred shares. The current market price for the Christiana preferred is approximately $100 per share. Christiana desires that its preferred stockholders be given this treatment, and the proposed merger terms provide for exchange on such basis with the Christiana preferred stockholders. While there is a reduction in income to the preferred stockholders, those who are not satisfied with their Du Pont shares may sell them and reinvest the net proceeds. The Du Pont common stock to be exchanged for such preferred stock will be valued for purposes of the merger on the basis of the average of the closing prices for Du Pont common on the New York Stock Exchange for the ten trading days immediately preceding the effective date of the merger.

On the effective date of the merger the Christiana preferred stock will be converted into Du Pont common stock at the rate determined as described above (such rate is estimated at .7323 shares of Du Pont common for one share of Christiana preferred, based on current average price for Du Pont common, determined as described below) and the Christiana common stock will be converted into Du Pont common stock at the rate of one share of Christiana common for 1.123 shares of Du Pont common. For the purpose of computing these conversion ratios, Christiana was valued at 97½% of the adjusted value of its net assets as discussed above, and the Du Pont common stock to be issued to the Christiana common stockholders was valued at $163.875 a share, the average closing market price for Du Pont common on the New York Stock Exchange on the five trading days immediately preceding July 17, 1972 (the date on which the proposed merger plan was approved in principle by Applicants' Boards of

Directors). The number of additional shares of Du Pont common stock, if any, to be distributed to the former Christiana common stockholders upon settlement of the tax claim will be determined on the basis of the procedure described above on page A97.

The tabulation attached as Exhibit F shows the financial effect of the proposed merger terms on the Du Pont and Christiana stockholders.

The proposed merger plan has been approved in principle by the Boards of Directors of Christiana and Du Pont. Under the Delaware Corporation Law the merger will require the favorable vote of the holders of a majority of the total outstanding shares of common stock of each company. Christiana and Du Pont will arrange for special meetings of their stockholders, after obtaining the exemption order requested herein, for stockholder vote on the merger proposal, such vote to be subject to receipt of a ruling from the Internal Revenue Service that the proposed merger may be consummated on a tax-free basis.

Under Delaware Corporation Law, any holder of Christiana's preferred stock who objects in writing within the prescribed time may receive a cash payment equal to the appraised value of his preferred stock. No such right is available with respect to any Du Pont common or preferred shares or any Christiana common shares.

The merger will become effective at the time of the filing of the agreement of merger as required by Delaware law. At such time, Christiana's corporate existence will cease and an order of deregistration pursuant to Section 8(f) of the Act hereby is requested to become effective upon satisfactory demonstration to the Commission that all business activity pertaining to Christiana has been concluded and that, pursuant to Section 13(a)(4) of the Act, a majority of Christiana's voting securities has approved a

change in Christiana's business so as to cease to be an investment company.

Application is being submitted to the Internal Revenue Service for rulings to the effect that no gain or loss will be recognized for Federal income tax purposes to either corporation or to their stockholders as a result of the merger except with respect to (1) cash received by any Christiana stockholder in connection with his disposition of an interest in a fractional share of Du Pont common stock, (2) cash received by any dissenting preferred stockholder of Christiana who elects appraisal rights and (3) certain portions of any contingent distribution in connection with the tax claim.

Certain of the Christiana stockholders receiving shares of Du Pont common as a result of the merger may be restricted by the Securities Act of 1933 with respect to disposition of such shares. Appropriate arrangements as to registration rights for such stockholders will be made to afford them suitable liquidity with respect to their holdings of Du Pont common.

Statutory Standards.

The terms of the proposed merger, in Applicants' opinions, are reasonable and fair with respect to all parties affected by the merger and do not involve overreaching on the part of any person concerned. These terms were developed after comprehensive financial studies and examination of all the factors which Applicants and the three financial advisors considered relevant, under the circumstances, to a determination of merger terms for the two companies. Such factors included net asset value, expenses and taxes, earnings, dividends, market value and market discount.

The mutual benefits which Applicants and their stockholders will obtain from the merger may be summarized as follows:

Christiana.

Preferred stockholders—The market value of these stockholders' holdings will increase to the amount at which their holdings could have been redeemed. Redemption for cash at $120 per share could subject these stockholders to Federal capital gains taxes.

Common stockholders—These stockholders will (1) realize increased market value of their holdings resulting from the elimination of the market discount described above, (2) realize increased income resulting from the elimination of the intercorporate dividend tax on dividend income from Du Pont and (3) obtain a more readily marketable security, with attendant increased convenience in transactions involving their holdings.

Du Pont.

Common stockholders—These stockholders will receive a benefit from a modest increase in earnings per common share resulting from the discount reflected in the merger terms.

Du Pont Company—Du Pont will also gain the beneficial effects of a broader market for its common stock and the corporate simplification resulting from the elimination of Christiana and its large holding of Du Pont common stock.

Applicants submit that the proposed transaction would not be contrary to the Congressional purpose in

adopting the Act which, as expressed in Section 1(b) of the Act, is to prevent transactions adversely affecting the national public interest and the interest of investors. Applicants further believe that an order exempting the proposed transaction from the provisions of Sections 17(a) and 17(d) of the Act should be granted because:

1. the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;
2. the proposed transaction is consistent with the policy of the registered investment company concerned, as recited in its registration statement and reports filed under the Act;
3. the proposed transaction is consistent with the general purposes of the Act;
4. participation by officers, directors and affiliated persons of each of the two companies is on the same basis as that of all other shareholders similarly situated; and
5. the requested exemption order is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

It is therefore requested that an order of exemption be granted under Sections 17(b), 17(d) and 6(c) of the Act with respect to the proposed transaction.

This application is made by Christiana pursuant to action taken by the Board of Directors of Christiana on July 17, 1972:

"RESOLVED, that each officer of the Company is hereby authorized on its behalf to take all actions and to execute all documents necessary or desirable to the end that an Agreement and Plan of Reorganization, with a form of Agreement of Merger between this Company and Du Pont appended thereto, may be submitted in definitive form to this board for its action at a later meeting, and that there may be filed as promptly as possible after this meeting (a) an application to the Securities and Exchange Commission for such orders as may be required to permit the merger to be consummated and at an appropriate time to deregister the Company pursuant to Section 8(f) of the Investment Company Act of 1940, and (b) an application for a ruling from the Internal Revenue Service with respect to tax aspects of the merger."

This application is made by Du Pont pursuant to action taken by the Executive Committee of the Board of Directors of Du Pont on September 16, 1970 and approved by the Finance Committee of the Board of Directors of Du Pont on September 21, 1970:

"RESOLVED, that the Treasurer or First Assistant Treasurer, E. I. du Pont de Nemours and Company, each hereby is authorized and directed on behalf of the Company, to file with the Securities and Exchange Commission, U. S. Government, pursuant to the provisions of Sections 6 or 17 of the Investment Company Act of 1940, applications, and any amendments thereto or other documents that may be necessary or desirable, for orders of the Commission granting exemptions from the provisions of said Act.

"RESOLVED FURTHER, that the Secretary or any Assistant Secretary of E. I. du Pont de Nemours and Company each hereby is authorized and directed to affix the seal of the Company to any documents executed in pursuance of the foregoing resolution and to attest the same."

All requirements with reference to the filing of this application have been complied with and the officers of Applicants signing this application and filing the same are fully authorized to do so.

Applicants do not request a hearing in this proceeding.

Any questions or communications regarding this application may be directed, with respect to Christiana, to A. Felix du Pont, Jr., Vice President, Christiana Securities Company, Du Pont Building, Wilmington, Delaware 19898, with copies to K. W. Gemmill, Esq., Dechert Price & Rhoads, 1600 Three Penn Center, Philadelphia, Pennsylvania 19102 and with respect to Du Pont, to L. E. Grimes, Assistant Treasurer, E. I. du Pont de Nemours and Company, 1007 Market Street, Wilmington, Delaware 19898, with copies to C. V. Smith, Jr., Esq., Covington & Burling, 888 Sixteenth Street, N. W., Washington, D. C. 20006.

WHEREFORE, Applicants request that an order be issued by the Securities and Exchange Commission under Sections 17(b), 17(d) and 6(c) granting exemption from the provisions of Sections 17(a) and 17(d) of the Act to permit Applicants to consummate the above-described transaction. Christiana also requests that an order deregistering Christiana be issued under Section 8(f) of the Act, to become effective upon satisfactory demonstration to the Commission that all business activity pertaining to Christiana has been concluded and that, pursuant to Section 13(a)(4) of the Act, a majority of Christiana's

voting securities has approved a change in Christiana's business so as to cease to be an investment company.

DATED: Wilmington, Delaware, July 19, 1972.

CHRISTIANA SECURITIES COMPANY,

By /s/ EDWARD B. DU PONT,
Edward B. du Pont,
Assistant Treasurer.

Attest:
/s/ T. E. HOUSE,
Assistant Secretary.

E. I. DU PONT DE NEMOURS AND COMPANY,

By /s/ E. M. ROBINSON,
E. M. Robinson,
First Assistant Treasurer.

Attest:
/s/ S. A. Milliner, Jr.,
Assistant Secretary.

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

The undersigned being duly sworn deposes and says that he has duly executed the foregoing application dated July 19, 1972, for and on behalf of Christiana Securities Company; that he is an Assistant Treasurer of such Company; and that all actions by the Board of Directors necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ EDWARD B. DU PONT.
Edward B. du Pont.

SUBSCRIBED and SWORN to before me, a Notary Public in and for the State and County aforesaid, this 19th day of July 1972.

/s/ EUGENE A. GRIDLEY III,
Notary Public.
My commission expires June 5, 1974.

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

The undersigned being duly sworn deposes and says that he has duly executed the foregoing application dated July 19, 1972, for and on behalf of E. I. du Pont de Nemours and Company; that he is the First Assistant Treasurer of such Company; and that all actions by the Executive and Finance Committees of the Board of Di ectors necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ E. M. ROBINSON.
E. M. Robinson.

SUBSCRIBED and SWORN to before me, a Notary Public in and for the State and County aforesaid, this 19th day of July 1972.

/s/ EUGENE A. GRIDLEY III,
Notary Public.
My commission expires June 5, 1974.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D. C. 20549

AMENDMENT NO. 6

TO
APPLICATION DATED JULY 19, 1972, FOR AN ORDER EXEMPTING PROPOSED TRANSACTION BETWEEN CHRISTIANA SECURITIES COMPANY AND E. I. DU PONT DE NEMOURS AND COMPANY

PURSUANT TO SECTIONS 17(a), 17(b), 17(d) AND 6(c) OF THE INVESTMENT COMPANY ACT OF 1940
FILE NO. 812-3224

Christiana Securities Company	Du Pont Building Wilmington, Delaware 19898
E. I. du Pont de Nemours and Company	1007 Market Street Wilmington, Delaware 19898
(NAMES OF APPLICANTS)	(ADDRESSES OF PRINCIPAL OFFICES OF APPLICANTS)

The following information relative to potential impact on the market for Du Pont common stock as a result of the proposed merger is submitted by way of Amendment No. 6 to Application in this matter dated July 19, 1972.

In the course of the merger negotiations the Special Board Committees of Du Pont and Christiana considered the possible immediate and longer term effect of the

merger transaction on the market for Du Pont common stock, and discussed this aspect of the transaction (including the comments thereon in their reports filed as exhibits to this Application) with the financial advisors. The financial advisors indicated that, in their opinions, there would be no significant or prolonged adverse impact on the market for Du Pont common stock. Pertinent factors relevant to such discussions and conclusions are summarized below:

1. More than 50% of the oustanding shares of Christiana common stock are held of record by Wilmington Trust Company in various fiduciary capacities, principally in trust for the benefit of several hundred individuals and institutions. In addition, a number of individuals hold of record substantial quantities of the shares. Generally, these holdings in trust and directly by the individual stockholders have existed for many years and are in the nature of a long-term investment in the Du Pont Company via stockholdings in Christiana.

Persons owning Du Pont common stock make their own decisions as to sales of such stock; however, Applicants know of no reason to believe that, upon shift of their long-term investments by reason of the merger from an indirect interest in Du Pont via holding Christiana common stock to a direct holding of Du Pont common stock, there would be any tendency for a large portion of such Du Pont common stock to be sold by such stockholders. Moreover, the tax basis for the Christiana shares held by such stockholders generally is very low (zero in many cases) due to the impact of the divestiture of General Motors stock by Du Pont and Christiana in the 1960's. As a result, the potential tax effects of sales of such shares represent a substantial deterrent to sales by such stockholders of Du Pont common stock received by them in the merger.

2. The directors of Christiana and certain other stockholders of Christiana may be deemed within the meaning of the Securities Act of 1933 and Regulations thereunder (1933 Act) to be "affiliates" of Christiana. As a result, such persons will be restricted by the 1933 Act with respect to disposition of shares of Du Pont common stock received by them in the merger. Du Pont has determined that it will treat Wilmington Trust Company as so restricted with respect to disposition of certain of the shares of Du Pont common stock it receives in the merger.

Based on information currently available, it is anticipated that approximately 70% of the Du Pont common stock to be issued in the merger transaction will be subject to the foregoing restrictions, which will prevent their sale to the public other than pursuant to an effective registration statement filed under the 1933 Act or in "brokers' transactions" as defined in the 1933 Act.

The applicable restrictions will be specified in agreements to be entered into between Du Pont and each stockholder of Christiana who will receive such restricted stock. These agreements will provide for restrictive legends to be placed on cer-

tificates for shares issued to such stockholders in the merger, and will further provide that such legends may be removed only to permit sale of such shares pursuant to an effective registration statement filed under the 1933 Act or upon receipt of an opinion of counsel satisfactory in form and substance to Du Pont that registration is not required under the 1933 Act to permit sale of such shares.

Certain registration rights will be afforded to the stockholders under these agreements, limited so as to permit registered sales of restricted shares only 1) during the months of April and October of each year in any lawful manner other than a firm commitment underwritten offering and 2) at one other time during each year in a firm commitment underwritten offering of at least $25 million in then current market value of such shares. No other public sales of the restricted shares would be permitted, except in "brokers' transactions" as defined in the 1933 Act, which transactions may not exceed, for any person in any six-month period, approximately one week's reported trading volume in Du Pont common stock. Applicants believe that these limitations on public sale assure that any public sales of Du Pont common stock to be issued in the merger would occur in an orderly fashion without significant or prolonged adverse impact on the market for Du Pont common stock.

This Amendment is filed pursuant to authorizations contained in the Application (page 23—File No. 812-3224) which authorizations are applicable to the respective

officers signing this Amendment on behalf of the Applicants and are still in effect.

DATED: Wilmington, Delaware, October 27, 1972.

CHRISTIANA SECURITIES COMPANY,

By /s/ EDWARD B. DU PONT,
Edward B. du Pont,
Assistant Treasurer.

ATTEST:

/s/ T. E. HOUSE,
Assistant Secretary.

E. I. DU PONT DE NEMOURS AND COMPANY,

By /s/ E. M. ROBINSON,
E. M. Robinson,
First Assistant Treasurer.

ATTEST:

/s/ THOMAS B. FARROW,
Assistant Secretary.

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

The undersigned being duly sworn deposes and says that he has duly executed the foregoing amendment dated October 27, 1972, for and on behalf of Christiana Securities Company; that he is an Assistant Treasurer of such Company; and that all actions by the Board of Directors necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ EDWARD B. DU PONT.
Edward B. du Pont.

SUBSCRIBED and SWORN to before me, a Notary Public in and for the State and County aforesaid, this 27th day of October 1972.

/s/ EUGENE A. GRIDLEY III,
Notary Public.
My commission expires June 5, 1974.

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

The undersigned being duly sworn deposes and says that he has duly executed the foregoing amendment dated October 27, 1972, for and on behalf of E. I. du Pont de Nemours and Company; that he is the First Assistant Treasurer of such Company; and that all actions by the Executive and Finance Committees of the Board of Directors necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ E. M. ROBINSON.
E. M. Robinson.

SUBSCRIBED and SWORN to before me, a Notary Public in and for the State and County aforesaid, this 27th day of October 1972.

/s/ EUGENE A. GRIDLEY III,
Notary Public.
My commission expires June 5, 1974.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

—

APPLICATION UNDER SECTIONS 17(b), 17(d), AND 6(c) AND RULE 17d-1 FOR AN ORDER EXEMPTING TRANSACTIONS BETWEEN AFFILIATES PURSUANT TO A MERGER.

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)
Investment Company Act of 1940

———

APPLICATION OF LEWIS C. MURTAUGH TRUSTEE FOR EMANUEL AND HELEN STEIB UNDER DECLARATION OF TRUST DATED 8/30/56 FOR LEAVE TO INTERVENE AS A PARTY PURSUANT TO RULE 9(e).

Lewis C. Murtaugh, trustee for Emanuel and Helen Steib under Declaration of Trust dated August 30, 1956, applies to the Commission for leave to intervene as a party in the above matter, for the reason that his participation as a party will be in the public interest and because leave to be heard pursuant to paragraph (C) and (D) of Rule 9 will be inadequate for the protection of his interest as holder of 400 shares of common stock and the interest of all the common stock holders of E. I. Du Pont De Nemours and Company.

In support of this application the following considerations are submitted:

1. Applicant is an Attorney at Law Licensed to practice in the State of Illinois since 1930 after graduating that year from Harvard Law School. He is also licensed to practice in the United State Supreme Court and the local United States District Court and the Seventh Circuit Court of Appeals, as well as the Tax Court and the Court of Claims. His general field of practice includes corporation law, including some derivative, class action and Rule 10 (b)(5) litigation. He taught corporation law for one year as an accommodation to his friend, the then Dean of Loyola University Law School in Chicago. These credentials are recited not that they are so impressive but to warrant the expectation on the part of the Commission that applicant has the capacity to comprehend and contribute to the resolution of this matter.

Applicant has had no experience in appearing before the Securities and Exchange Commission, but feels confident that he can deal with the legal and factual issues as to what is fair and reasonable and not overreaching, as he has met these issues numerous times in the course of his practice.

2. Applicant has attached hereto as Exhibit A copies of the following instruments sent to the Securities and Exchange Commission.

1. REQUEST FOR A HEARING AND ADVICE dated October 25, 1972.

2. SUPPLEMENT TO FILED REQUEST DATED OCTOBER 25, 1972, dated October 31, 1972.

3. SUPPLEMENT TO FILED REQUEST DATED OCTOBER 25, 1972, dated November 14, 1972.

The contents of said Exhibit A are here incorporated by reference and the substance of the points made thereby

are here reiterated in the filing. Financial journalists have indicated in their articles that Exhibit A was a prime reason that a hearing has been called.

3. If minority interests are to be heard it is essential in this situation that intervention by responsible minority groups or persons should be allowed. The Securities and Exchange Commission staff representative indicates that the Commission does not plan to offer evidence, investigate the issues raised or participate actively. Some one or more persons with the right of a party as provided for in Rule 9(e) are indispensable.

4. As I read the Rules, only parties have the right to present oral and documentary evidence and to conduct cross-examinations [Rule 14(a)] or to ask for subpoenas for witnesses [Rule 14(b)] or to take depositions for discovery or otherwise [Rule 15(a)] or to submit interrogatories [Rule 15(g)] or to file a petition for a review [Rules 17 & 26] or to make oral argument before the commission [Rule 21(a)]. While the rulings of the Commission as to fact if supported by substantial evidence are not vulnerable on appeal it is the evident intent of Section 42 of the Investment Company Act to qualify this if all evidence is not considered, which would surely be the case if this applicant is denied the rights of a party and someone else doesn't come forward to do what he intends.

5. Here are some of the matters as to which discovery or information is sought:

a. A further breakdown of shareholders of Christiana to identify as classes.

1. The total number of Associates according to SEC regulations.

2. The total number of shares which would be added to this group if persons, second cousins or closer (by blood or affinity) to the common directors not included in #1 were included as if as an SEC associate.

b. Copies of pamphlet list of 40 individual shareholders of Christiana and their holdings.

c. Information which DuPont or Christiana has as to the bases for gain & loss of the 334 shareholders of Christiana (Sec. P6 of Exhibit 2 of Morgan Stanley study) who hold 1,000 shares or more which constitutes 95.5% or 11,183,194 shares out of 11,710,103 shares outstanding.

d. Even if the company doesn't have the answer to (c) we ask a table showing figures for all Directors with du Pont blood and their brothers and sisters and the descendants of their grandfathers (intended to find out extent to which low bases might deter sales). Any information on this point is requested.

e. What was the basis of Christiana shares per share as finally determined in the estate of Irénée du Pont who died in 1963 and what was the market value of Christiana and General Motors at the time of his death.

f. Please give the same information as asked in Question F as to estates of any other persons of du Pont blood holding 5,000 shares or more who died in the last 15 years.

Alternatively, if not available, given the dates of death, the number of shares (if over 1,000), and the names of executors and site of administration.

g. Copies of opinions, reports and data furnished by Morgain Stanley & Merrill Lynch in relation to the asserted deficiency and claim for refund and the suit involving Christiana and the government (now pending in Delaware).

h. Copies of all material other than described in G furnished to the government in connection with matters described in G.

i. Copies of the Record, including transcript before Judge LaBuy below and briefs in the United States Supreme Court, October terms, 1960, 366 U. S. 316. The relevance is set forth in Exhibit B attached hereto.

j. Copy of final order of Divestiture entered by Judge LaBuy.

k. Copy of material submitted before congress and congressional report on tax relief bill also a citation or reference to where the law and report can be found.

l. Copies of Annual Reports of DuPont and Christiana from 1960 to date also of any special reports dealing with General Motors shares of DuPont or Christiana. Include offers of exchange of General Motors for DuPont or Christiana shares.

m. Copies of all communications to Christiana shareholders about the DuPont merger and the restrictions on shares to conform to the Security Act and of all papers and data showing restricted shares and status of same at this time including copies of restrictions.

n. Other material may be sought from others (e.g. about the Henry F. du Pont Tax Court case described in Exhibit A(3)).

o. The mailing address of each director of DuPont and Christiana.

p. Copies of minutes of all meetings of directors and shareholders of Christiana and DuPont which contain any reference to the merger and of all special subcommittee meetings and all written material, relating to the merger (include financial advisors material).

q. All material relating to selling intentions of Christiana shareholders or selling schedules, proposed broker's sales or private placements.

r. The names of the persons responsible for the opinions of the three financial advisors and of Merrill Lynch's and Morgan Stanley's opinions in the tax refund matter.

s. What will be the total holdings of DuPont *proforma* of du Pont family and related interest as defined with annual reports after the merger (to test the extent of the assumed advantage of getting out from under the family thumb).

Obviously no mere participant can do the job that needs to be done, especially since the staff of the Commission seems to be more or less neutral. This I much regret, since their capability when roused against insider profit-reaping is renowned. The attitude seems to be that nothing can be too bad if it is fully disclosed. Obviously the iron grip Christiana and the du Ponts have on DuPont make disclosure more or less incidental, which is why the Investment Company Act of 1940 was passed. There's such a thing as being perfectly candid, even persuaded you're right, and still being unfair, unreasonable and overreaching. However, there is an aura of Rule 10(b)(5)

violation here in the hush-up of the market effect issue which was not mentioned in the application, consequently not in the notice sent out digesting the application, nor in the prospectus as presently proposed.

6. There are difficulties in opposing the wills of people who have billions so as to make the six or seven figure cost of the program they promote mere chickenfeed. This is especially true when there is a half billion dollar windfall tax free in the project of voting both companies shares for the benefit of the shareholders of one and the detriment of the shareholders of the other.

On the other side, to put it optimistically, it is quite uncertain that time spent or expenses incurred or even results accomplished in opposition will be recognized financially. Therefore frugality is indispensable. Another point is the support of prestigious financial advisors enlisted by Applicants. Now, these advisors did not, as pointed out in Exhibit A(2), deal with the effect on the market for DuPont shares; but still they are obviously allied with the Applicants. Their names would cow almost any other people in the securities industry. If these leaders, who control a major part of all underwriting in the nation say, "Black is grey" anyone in the industry who says "Black is black" might well view his future apprehensively, or possibly say "Our second thought, black is grey." Call it club spirit, fraternalism, cronyism or caution, the industry leaders who stood in line to fill the record in the DuPont-General Motors Case (see Exhibit 2 hereto) to prove the points I am making will not be heard from in this vein here.

7. There is an implied invitation to add matters and questions for consideration at the hearing. I gladly do so realizing that some, but far from all, may be within the scope of what is suggested in the order for a hearing,

though, in my opinion all of them should be. I also suggest my present view of the answers which might be modified after a hearing, but which I hope to elaborate on, if not modified.

a. Q. Should there be a merger?
   A. Probably not.

b. Q. What is the synergistic value to each merging side of the combination?
   A. Great for Christiana. It becomes part of a vital operation rather than a mere conduit. For DuPont sterile is the word. Nothing to raise expectations, to vary operations, to add profit (a couple of cents added to earnings is laughable).

c. Q. Who gets the better grade of security as a result of the merger?
   A. Christiana. It gets 1 & ½ blue chips for every red chip it turns in; and it gets the blue chips out to its shareholders tax free. The chips both had established values in the market place and a half billion dollars is added to the value Christiana shareholders had, which is made possible by their control of DuPont.

d. Q. Were Christiana shares underpriced in the market before the merger?
   A. No. Their price compared favorably with similar securities. A potential exploitation of the DuPont interlock may have enhanced it.

e. Q. Are either sides' shareholders benefited by the merger?
   A. Only Christiana's.

f. Q. Were the merger terms what parties truly free to bargain at arms length, in their own interests, including not to merge, would agree to?
A. No.

g. Q. To what extent does the merger give a premium from the party suggesting it, and benefiting from it, and controlling the terms and the decision whether or not there will be a merger?
A. A minus extent. Usually a party seeking a merger offers a premium of 15% to 25%. Here DuPont, the courted, makes possible a premium of 33%. Added to say 17% normal premium from a suitor, a 50% deviation from normal is being given for the pleasure of their non-company. (But, then, this a shotgun wedding.)

h. Q. Are either sides' shareholders hurt by the merger?
A. Only DuPont's.

i. Q. Will the newly marketable shares of DuPont help or hurt the price of DuPont shares generally?
A. There are nothing but bearish aspects to this situation.

j. Q. To what extent do the merger terms provide a factor to counteract the negative factors for DuPont shareholders?
A. None. The 2½% (1.8%) factor was not represented to be anything in the counteracting of disadvantages, only a justification for co-

operation in a situation without disadvantages.

° ° °

The status of a participant simply will not afford the stockholders of DuPont the protection they need. Enclosed as Exhibit C is a copy of a letter I wrote on November 22, 1972, on the simplest of matters. It still has not been answered, though acknowledged. A fair conclusion is that this is total war. Two sides are needed. Respectfully I must advise that if denied the right to intervene as a party, I will of course be a participant, but will also seek an interlocutory review of the order denying intervention.

Respectfully submitted,

/s/ LEWIS C. MURTAUGH,
LEWIS C. MURTAUGH, TRUSTEE FOR
EMANUEL AND HELEN STEIB
UNDER DECLARATION OF TRUST
DATED 8/30/56.

Lewis C. Murtaugh, Trustee
141 W. Jackson Blvd., Room 2650
Chicago, Illinois 60604
312/939-2880

Exhibit A to Lewis C. Murtaugh

Application to Intervene

A1. REQUEST FOR A HEARING AND ADVICE dated October 25, 1972.

A2. SUPPLEMENT TO FILED REQUEST DATED OCTOBER 25, 1972, dated October 31, 1972. 5 pages before Exhibit A3

A3. SUPPLEMENT TO FILED REQUEST DATED OCTOBER 25, 1972, dated November 14, 1972. Last 4 pages

[Letterhead of]

MURTAUGH, KING, NEIMAN & GRAIS
2650 Board of Trade Building
141 West Jackson Boulevard
Chicago, Illinois 60604

October 25, 1972

Mr. Ronald F. Hunt, Secretary
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

In Re: 812-3224
Application of Christiana Securities Company and E. I. DuPont de Nemours Company

REQUEST FOR A HEARING AND ADVICE

Dear Mr. Hunt:

The undersigned, Lewis C. Murtaugh, is the holder as Trustee of 400 shares of the common stock of DuPont, and has several clients, including his wife, who own several thousand shares. (His wife, Mary Imelda Murtaugh, owns 1,350 shares.) By a communication dated October 4, 1972, and postmarked October 5, 1972, he was first advised of proposed merger terms of Christiana into DuPont, whereby shareholders of Christiana would receive 1.123 shares of DuPont for each Christiana share. Upon return from a four week trip abroad on Friday, October 13, 1972, when the communication first came to his attention, the undersigned immediately wrote DuPont and the S. E. C., a copy of which letter is attached as Exhibit "A".

On Monday, October 16th, the next business day, an official of the S. E. C. called to advise that his only suggestion was to inspect the files at the S. E. C. library. His information indicated that a proxy approval was going forward simultaneously, contingent, of course, on S. E. C.

approval of the proposed merger terms in accordance with the Investment Company Act of 1940.

Not having heard from DuPont by Wednesday, October 18th, the undersigned purchased an airline round-trip ticket for Thursday. He spent the day (October 19th) in the S. E. C. library, read the entire file, photocopied some pages, and made notes. Returning to the office Friday, he found that an officer of DuPont had called while he was in Washington and told the switchboard girl he would be glad to fill me in with details. This call was six days after my letter and possibly was due to institutional drag, but also possibly to the serious concern the undersigned had expressed in Chicago as to the reasonableness of the merger terms, which quite possibly filtered back to Wilmington.

In any event an offer on Thursday, even if it included a copy of the filing to be sent the undersigned, such material would not have been received until Tuesday, October 24th (October 23rd was a mail holiday), hardly time to meet the October 27th deadline set by the S. E. C., a fact stressed in my letter (Exhibit "A"). Even devoting 10 hours a day, the shortage of time prevents this presentation from being as well organized or supported as the half billion dollar issue warrants. But, to get to the heart of the matter.

1. Mr. McCoy's Covering Letter Vitiated the S. E. C. Notice.

Comparing the three page S. E. C. notice with Mr. McCoy's covering letter of October 4, 1972, it is noted that Mr. McCoy states that a copy of the S. E. C. notice is enclosed "for your information", a sedated form of indicating that keeping shareholders advised was all that was involved, rather than letting them know they were to have

a chance to express themselves in this murky conflict of interest situation where DuPont family interests controlled both sides and were garnering over $500,000,000 in a five month rise in Christiana quotations from the merger for the shareholders of Christiana, largely themselves and family. Since the company itself had the complacency, presumption or shrewdness not to request a hearing, if the shareholders could be lulled into not requesting one, no fresh air could ever ventilate the situation. Certainly, this is the very situation Congress envisioned in passing the Investment Act of 1940.

I should add that Mr. McCoy's covering communication went on to further soothe that "the stockholders of the DuPont Company are not required to take any action with respect to the proposed merger at this time". Never a word about the fact that they were priviledged to submit objections or request a hearing, or seek the production of more information, or a more penetrating analysis of the market effect of releasing 13,000,000—or 28% of DuPont shares previously off the market upon the stabilized price relationship based on only 72% of DuPont shares being available. The very purpose of the notice was contrary to Mr. McCoy's innuendo that stockholders should ignore the S. E. C. notice and the effect was to negate the Congressional intent in passing the Investment Act of 1940. Then follows the illusion of recourse, action at a stockholders meeting where the DuPonts and Christiana make voting meaningless (all as recognized in the 1940 Act).

2. There Was No Reason, Absent an Anticipation of a Conflict of Interest Transaction Beyond Imagination, to Assume the Market Value of Christiana Shares Was Not a True Index of Their Value.

It would seem that the S. E. C. notice could have been more objective if it had qualified or omitted the fact that

Christiana common was "traded in the over-the-counter market in only limited quantities", as if this was the reason or more than a minor part of the reasons "its market price consistently has been less than the market value of Christiana underlying assets". It would seem that the Company's hook, line and sinker approach was swallowed by whoever passed on this inference (or judgment) so unqualifiedly.

Contrariwise, the stock trading in Christiana was not inconsiderable, considering 56% was tied up in trusts and bore a reasonable relation to many listed stocks.

This stock has been on the market for possibly 40 years. When DuPont was recommended, it too was in many "buy" recommendations and sometimes with a comment about the discount from DuPont. To attribute the discount to a thin market is to magnify an element in the combination of ingredients to the exclusion of all others. The market has had over a generation to know DuPont and Christiana and to buy all it wanted. Investment analysis has been lavished on this situation. To ignore market evaluation of the existential relation of DuPont and Christiana is to obscure the truth, which has been searched for and found by investors and their advisers over a span of decades. Does any one doubt that over a period of several years, hundreds of millions of dollars of Christiana could have been picked up on the offer side of the over-the-counter market without haggling between bid and offer for less than DuPont? In fact, what a splendid thing it would have been for DuPont, itself, to have bought every time Christiana declined 20% below DuPont.

The only thing the wise and careful analyst did not anticipate was the impossible concept of a tax free exchange by DuPont with Christiana shareholders on the basis now suggested. Even when the announcement of the consideration of the idea of merger was made in April,

the financial community did not evaluate Christiana shares for the next three months at above DuPont, until in July when the amazing proposal was adopted by the interlocking directorates, controlled by the DuPonts. All the figures were there for any analyst or investor. No one, but no one, apparently conceived the monumental courage or gall would be to trade on such a premium to Christiana shareholders, as proposed.

3. Market Value of Christiana Cannot Be Ignored and Asset Value Substituted Just Because DuPont as a Corporation Is Not Raided.

In *Texas Gulf Sulphur*, the company was not raided either. Just certain shareholders in relation to other shareholders. The essential point there and here is insider benefit. Here, however, the insiders were already in, and are proceeding with a certain amount of candor to establish the point, as bait, that DuPont per book is getting a minuscule advantage, which supposedly filters by osmosis out to its shareholders, while, *mirabile dictu*, half of a billion is created out of nowhere and funnelled unfiltered into the pockets of controlling interests, without any real detriment to DuPont shareholders.

There is a principle of logic "Everything that exists has a sufficient reason for its existence or mode of existence.". Also a principle of conservation of energy. This suggests that newly existing one-half of a billion dollars cannot be given to 28% of DuPont shareholders without in the long, short, or intermediate run coming out of the values of the remaining 72% of shareholders. The colossal bonanza was not created. It was in large part diverted by casuistry of the most demonstrable sort. "Things equal to the same things are equal to each other"; ergo—a share of DuPont owned by Christiana is the same thing as a share owned by a non-Christiana shareholder or a shareholder

of Christiana owns the same thing as a shareholder of 1.15 shares of DuPont.

The fallacy of the presentation is the categorical assertion at page 9 of the S. E. C. filing and elsewhere:

> "A holding of Christiana common stock represents essentially a holding, indirectly, of DuPont common stock".

This is not true, either essentially or indirectly, though if the words "superficially" were substituted for "essentially", it would be closer to the truth, especially if for "indirectly" were substituted "irrelevantly". The essential difference will be discussed hereafter, what might be called the existential difference is the relation of 72% of shares to the total public market and the absence of 28% from it, and the changes to be expected from the new proposal.

The record is incomplete. The whole issue is the effect on the other shareholders not on the company as such and the distinguished financial houses hardly touched on this, and certainly show no data was provided or analyzed, and the company filing with the S. E. C. is silent, as if the only interest DuPont shareholders could have was not in their own values as owners of freely tradeable shares but in the company's net worth per books.

There has been no adequate presentation on this point but only disclosure in terms of $45.00 advance over market for Christiana shareholders without aggregating in terms of a half billion dollars, the colossal disparity in advantage flowing to the controllers of DuPont. Indeed, the whole presentation to the S. E. C. including the incomplete investigation by prestigious investment houses virtually ignores this point and present no sign it was seriously considered. This is especially noteworthy since DuPont, itself, sponsored voluminous evidence in the General Motors

divestiture Case (*U. S. v. DuPont and General Motors, Trade Cases, 1959, ¶ 69461*) and no doubt before Congressional committees on the impact of a relatively smaller block of released stock on General Motors stock prices. It even secured special legislation. One expert, IRWIN FRIEND, testified on the effect of added existing stock to the market. The Court said "Dr. Friend agreed that there had never been anything in the past comparable to the sales contemplated by the Government plan.". He also testified that an increase in the supply of stock of 10% had in the past brought about a decline in price of 5%, that an increase of 20% had been associated with price declines between 10% and 15%.

As will be argued hereafter, the market price of Christiana shares was a true index of their value partly because its DuPont was not on the market. But the point here is the market price of the 72% other shares was based on this supply of DuPont shares being on the market. Adding 28% more shares, 13,000,000 plus, to a stabilized supply and demand situation could not fail to destroy the balance forty years had solidified. Nor is DuPont's recent market performance or earning dynamics such that a swelling demand is being generated to swallow such an influx without an effect on prices of DuPont shares.

Whether this is true or not cannot be determined from the filing's supporting opinions which are geared entirely to the effect on DuPont as a company, and not on the prices of the shares as affected by the release of 13,000,000 added shares in a market stabilized on the basis of their not being available.

Even if the Wilmington Trust Company and the DuPont directors kept their newly distributed DuPont shares, over 10% of DuPont would be distributed to 7000 or so other Christiana holders. This would indicate a

$230,000,000 market loss to other DuPont shareholders according to DuPont's witness, Dr. Friend.

Surely, Wilmington Trust Company is longing to diversify its trust portfolios. If, however, it kept a third of its distributed DuPont the remainder of its DuPont would be another 10% on the market, which Dr. Friend's testimony indicated would cause price declines of 10% to 15%, or 470 million to 700 million. This is a figure quite remarkably similar to the largesse Christiana shareholders are getting.

In sum, no adequate inquiry or report of selling intentions or the market effect of selling is in the record and the approval of a merger, especially on the terms sponsored by the interlocked Directors is incomplete, without full consideration of this point. For other evidence on the general subject of adverse price effect of added shares to the market, see the evidence of Gordon in the *F. C. C. case A. T. & T. Co., Docket No. 16,258 (1968).* And, generally, as supporting the same thesis, see James C. Bonbright, *Principles of Public Utility Rates* (New York: Columbia University Press, 1961); *United States v. E. I. duPont de Nemours and Company, General Motors Corporation, et al., Trade Cases* (Chicago: Commerce Clearing House, 1959), par. 69,461; David Durand, "The Cost of Capital, Corporation Finance, and the Theory of Investment: Comment", *American Economic Review 49* (September 1959), 639-55; and Douglas Vickers, *The Theory of the Firm: Production, Capital, and Finance* (New York: McGraw-Hill Book Co., 1968); also John Linter, "Dividends, Earnings, Leverage, Stock Prices, and the Supply of Capital to Corporations", *Review of Economics and Statistics 44* (August 1962): 243-69. (SEE FOOTNOTE [1] BELOW.)

[1] Please note the confirmatory evidence of Christiana, Irénée du Pont, Jr., Morgan Stanley and Merrill Lynch contained in Exhibit "B" received too late to be included in the text at this point.

4. THE FINANCIAL BENEFIT TO DUPONT SHAREHOLDERS IS NEGLIGIBLE.

Dealing with what would be generally considered sizeable companies, a $40,000,000 favorable adjustment of allocable interest in a company's net worth might not be insignificant. With DuPont, however, it means corporate net worth per book is divided not into 47,566,694 units per share, but only into 47,377,500 units, an increase in unit of .004 or sixty cents in terms of the market value of a share buried where DuPont shareholders cannot get at it and the market will disregard it, as compared with around $40.00 apiece extra in hand to each Christiana shareholder.

While $40,000,000 per book, not added to DuPont's earnings but merely divided into almost indescribably small units, may "provide sound business reasons" for DuPont to present its insiders with 500 million, DuPont's outsiders are justified in being skeptical and respectfully to inquire if in fact they are not making an unwitting contribution, and to seek thorough and documented assurances on this point.

5. REASONS OTHER THAN A THIN MARKET THAT CHRISTIANA WAS WORTH LESS AND SOLD AT A DISCOUNT FROM DUPONT.

a) The currently effective tax rate of 7.2% on dividends received meant that for each five dollars, DuPont shareholders received, Christiana had for distribution to its shareholders for its 1.15 shares of DuPont, only $5.16 before administration expense. Such expense probably legitimately absorbed the 16 cents (unless DuPont footed the bill). The excess of .15 per share of DuPont in Christiana assets was virtually

useless for producing an income advantage over DuPont.

b) A company whose sole assets consists of the shares of another company's shares are intrinsically worth less than the shares of the other company. Apart from the dividend tax, the holding company does not share in the operating income of the other company, can only benefit from dividends and cannot accumulate net worth.

c) If the operating companies values increase, the holding company must pay a tax on the increase of its shares if it sells, it and its shareholders must pay again at ordinary income rates on the dividends that distribute the profits. All other things being equal, no one would equate a holding of 2000 shares of a marketable stock with the ownership of a company whose sole asset was 2000 shares of such operating company's stock.

d) The individual situation here was enlarged on in another aspect heretofore. Although not clearly enough stated, the shares of DuPont Christiana held were virtually frozen. These shares were not owned by Christiana shareholders, but were a single block completely indigestible by the market. The blockage defect so often projected by DuPont has been heretofore referred to.[1]

e) All knew that Christiana held a negligible basis and if it sold its net asset value would be reduced by 25%, possibly more. Forty years of appreciation remained to be paid for by any new Christiana investor, plus a tax to get it out.

[1] And also by Christiana in its claims and suit against the United States for a tax refund. See Exhibit "B" attached hereto, which is very relevant at this point.

f) It is not suggested this list is complete, but time requirements prevent deeper analysis and exposition.

In buying Christiana, therefore, one bought DuPont with built-in impediments, which, more than the limited market, account for the discount at which it sold.

The indications are that the three financial houses referred to were told there was going to be a merger—no question of that. Each then settled on a net asset value approach for Christiana, and a market value approach for DuPont, which is equating unlikes. The vast investment of DuPont in facilities and research, the cash flow, its financial conditions, no U. S. long term debt, and many other advantages which time forbids defining, are swept under the DuPont price rug, while all the barnacles are meticulously scraped off the Christiana and Christiana's DuPont shares.

In fact, in the S. E. C. filing (p. 9), the company frankly states that a modest increase in DuPont earnings per share were what attention centered on. "Seek and you shall find". This goal was brilliantly achieved. Between 1 and 3 cents a share extra in earnings will result for DuPont shareholders. Seldom has modesty been so scrupulously observed.

6. THERE WAS NO ARMS-LENGTH CONSIDERATION HERE.

Forgetting all the reasons why this transaction is affirmatively unfair to outsider DuPont shareholders, we reach another point.

If A owns property which it would be of advantage to B to own, or which could be so rearranged that B's value would be substantially increased, is there anything unfair

if A seeks part of the advantage, even assuming (contrary to fact) A was not disadvantaged.

Many Americans, much less aggressive than David Harum, would think in this setting it was reasonable to gain something more than a tip, and A's reasonably aggressive independent sub-committee should have canvassed this concept more thoroughly. Certainly, most law firms would feel they had let their clients down in an arm's-length bargaining situation if some recognition in the colossal enrichment of Christiana shareholders were not given outside DuPont shareholders.

As stated, even a fair as compared to a fairly aggressive approach would give reason for a better deal without injustice or overachieving to Christiana or its shareholders. On the contrary, a fair comment would be that we are observing the dismantling of "noblesse oblige", a carefully structured public relations stance of the du Ponts to their company's shareholders.

° ° °

IF THE SHAREHOLDERS MEETING IS NOT POSTPONED until time for consideration of an appeal from the action of the S. E. C. (either after a hearing or denying a hearing) is expired, the protection of the 1940 Act will be nullified. The files indicate that proxy approval consideration is well advanced. If no hearing is to be granted, and if no substantial modification of terms is directed without a hearing, and if no additional filings are made available to the undersigned for study (at the S. E. C. library if necessary), there is danger that proxy approval around the time of the next S. E. C. actions, will result in immediate mailing that would negate the rights of DuPont shareholders as a practical matter under Sections 35 and 42 of the Investment Act of 1940 as well as frustrating its general purposes.

Therefore, in the interests of the undersigned and all other shareholders of DuPont (other than Christiana), the undersigned requests that the approval of a proxy statement on the Notice of a meeting of shareholders of DuPont be held back to the extent necessary to allow for a court review of any order. To do equity the undersigned offers to file a Petition within thirty days, rather than sixty days, in the Circuit Court of Appeals. The giving of notice of the shareholders meeting almost certain to follow immediately as a tactical matter with a favorable finding by the Commission and approval of a proxy statement in hand, unless restrained by the Commission by conditioning its action on a thirty day delay after the record is filed, will cause irreparable harm, forcing an individual into a class action where under Rule 23 of the Federal Rules enormous difficulties are presented of expense as well as effort. The 1940 Act was intended to afford a full consideration by the S. E. C. after hearing all the evidence in just this situation.

Naturally, the writer feels the proxy as presently proposed is incomplete and misleading, for the same reasons as above set forth, and others which could be developed with time.

One point which obviously is lacking is a notice of this or any other challenge to the proposal with further possibilities of appeal. Another is the failure to include information as to Christiana's contentions based on the affirmation of Irénée du Pont, a director of Christiana and DuPont, that a distribution of a far less percentage of a more widely traded stock injuriously affects prices for all the stock (see Exhibit "B").

My point, however, is that calling the stockholders meeting will merely compound confusion if the appeal rights of the undersigned go forward.

DuPont and Christiana have lived with each other 40 years. Their relationship invokes all the protections envisioned as needed by the Investment Act of 1940 and no sufficient reason exists for denying the full benefits of the Act to the shareholders of DuPont fixed in a web of interlocking directorates in probably the most obvious (and colossal in terms of dollars) conflict of interest posture in corporate legal and financial experience since the securities industry first came under mature control.

Respectfully submitted:

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh,
Trustee for Emanuel and Helen Steib under Declaration of Trust dated 8/30/56.

LCM/lz
Enclosures

EXHIBIT "A"

[Letterhead of]

MURTAUGH, KING, NEIMAN & GRAIS
2650 Board of Trade Building
141 West Jackson Boulevard
Chicago, Illinois 60604

October 13, 1972

Securities & Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Mr. C. B. McCoy
Chairman and President
E. I. duPont de Nemours & Company
Wilmington, Delaware 19898

Gentlemen:

I am the record owner, as Trustee, of 400 shares of DuPont common stock. My wife, Mary Imelda Murtaugh, is record owner of 1350 shares.

I am very interested in having the opportunity of inspecting the S. E. C. filings, including supporting instruments, in connection with the Christiana Securities Company merger. Please advise how this would be practically possible.

Thank you very much for your early reply. The deadline of October 27, 1972, makes this request for promptness unavoidable.

Very truly yours,

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh.

LCM:lz

EXHIBIT "B"

TO

REQUEST FOR HEARING AND ADVICE

BY LEWIS C. MURTAUGH, TRUSTEE

In Re: Securities & Exchange Commission
No. 812-3224

Application of Christiana Securities Company and E. I. duPont de Nemours & Company

Upon inspecting the company's filing with the S. E. C. in Washington, on Thursday, October 19th, I noted the number of the Tax case referred to in the filings, namely, *Christiana Securities Company v. United States of America, Civil Action No. 3831, United States District Court for the District of Delaware.* On Friday, I called the Clerk of that Court and requested a copy of the Complaint, which was forwarded and received in the morning mail on Tuesday, October 24th. The final draft of the "Request for a Hearing and Advice" was past the point where this information should be included logically, and it is added here as a Supplement:

The Complaint recites that in connection with the distribution of 6,708,560 shares of General Motors to Christiana in 1962, that the Internal Revenue Service failed to agree to a valuation of the shares at a fair market value which reflected the discount from current market prices to which the large block of shares were entitled.

DuPont owned 63 million out of 285 million shares of General Motors, or between 22 and 23% (This is over six times the issued shares of DuPont.). Christiana's 28% shares of these shares on distribution from DuPont would be around 17,600,000 shares. On July 9, 1962, it received 6,708,560 shares of General Motors, the first of three distributions. This was a little less than 2½% of all General Motors shares. Let the Complaint speak for itself as to the 1962 distributions, paragraphs 23 to 31 follow as part of this text:

> 23. In order to determine the "fair market value" of this block of GM stock, Taxpayer retained two leading underwriting firms, Morgan Stanley & Co. (hereinafter referred to as "Morgan Stanley") and Merrill Lynch, Pierce, Fenner & Smith Inc. (hereinafter referred to as "Merrill Lynch") to make independent appraisals of the value of such block of stock. The underwriting firms at that time were asked to determine the value of this block of stock as though no restrictions had been imposed thereon under the Judgment. The diminution in value resulting from such restrictions was therefore not taken into account in the contemporaneous appraisals made by these underwriting firms.
>
> 24. Morgan Stanley and Merrill Lynch each concluded that the fair market value of the 6,708,560 share block of GM common stock received by Taxpayer on July 9, 1962 would not be accurately reflected by the prices paid for GM common stock in New York Stock Exchange transactions on or about July 9, 1962. In their view, such a large block of stock would have a seriously depressing effect on the market and could be sold only at prices substantially below the prices paid for the relatively very small amounts of stock actually sold on the New York Stock Exchange on or about July 9, 1962.
>
> 25. Morgan Stanley and Merrill Lynch each further concluded that sales to underwriters for the purpose of secondary distributions would be the only

feasible market for such a block of stock and that its "fair market value" should be determined with reference to the price that would be received on such a sale to underwriters.

26. In the opinion of Morgan Stanley, the "fair market value" of the 6,708,560 share block of GM common stock received by Taxpayer on July 9, 1962 was $275,050,960 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

27. In the opinion of Merrill Lynch, the "fair market value" of the 6,708,560 share block of GM common stock received by Taxpayer on July 9, 1962 was $277,566,670 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

28. On its Federal income tax return for the calendar year 1962 Taxpayer reported as part of its gross income a value for the 6,708,560 share block of GM common stock received by it on July 9, 1962 based on the average of the appraisals by Morgan Stanley and Merrill Lynch values referred to above, *viz.*, $276,308,815, and erroneously failed to take into account the fact that the "fair market value" of that block of stock was much lower because of the restrictions placed on such block by the Judgment.

29. The "fair market value" of the 6,708,560 share block of GM common stock, after taking account of the effect of the restrictions placed on such block by the Judgment, was not in excess of $248,677,933.

30. The District Director erroneously concluded that the "fair market value" of the 6,708,560 share

block of GM common stock received by Taxpayer should be determined by multiplying by 6,708,560 the average of the highest and the lowest per share prices of the relatively small amounts of GM common stock traded on the New York Stock Exchange on July 9, 1962, and therefore erroneously determined that the "fair market value" of the 6,708,560 share block of GM common stock received by Taxpayer on July 9, 1962 was $319,914,455.

31. The total refund of taxes due to Taxpayer by reason of the improper and erroneous valuation of the 6,708,560 share block of GM common stock received by it on July 9, 1962 is $5,337,437. In making this claim, Taxpayer has given effect to, and set off, an increase of $219,011.72 in taxes on increased capital gains realized on its sale during 1962 of 550,000 shares of GM common stock out of the block received by it on July 9, 1962 (such increased capital gains being attributable . . .).

It will be noted Christiana claims a discount of over 13% because of a distribution of only 2½% of General Motors stock. And it bases this on findings of prestigeous houses to support its contentions. (Morgan, Stanley & Co., one of the presently involved advisors, is one.) Here, Christiana is about to distribute *at one time* 28% of DuPont (13,000,000 plus shares) and endeavoring to persuade the S. E. C. and its chained DuPont shareholders to make this possible without any evidence on the points as to value impact on all shares.

We have no doubt that the same financial houses would have raised their discount greatly if Christiana received all 17,600,000 General Motors shares at once, even though this would still only be 7% of outstanding General Motors shares, as against 28% here.

Paragraphs 69-80 of the Complaint make a similar claim as to the 1964 distribution of 4,830,163 shares of General Motors, only about 1¼% of the outstanding General Motors though the discount value of this per experts was only 10%.

Paragraphs 102-113 pertain to the 1965 distribution of 6,708,560 shares of General Motors. The same experts were retained and DuPont accepted and sponsored their average figure which was 8½% below the market period of General Motors stock.

The claims for refunds attached to the Complaint are all signed by Irénée duPont, Jr., as an officer of Christiana, who I believe, is the same gentleman whose letter to Mr. McCoy started the merger ball music. Mr. DuPont affirms "under penalties of perjury" that after taking account among other things "of the huge amount of stock involved" (about 2½% in 1962 and 1965 and much less in 1964) that the value of General Motors was much less market value.

Lewis C. Murtaugh

(A)

THE VALUATION OF GM STOCK RECEIVED BY TAXPAYER

69. This part of Taxpayer's refund claim for the year 1964 is similar to that part of its refund claim for 1962 set out in paragraphs 10-31 hereof with regard to the valuation of GM stock received by Taxpayer.

70. On January 6, 1964 Du Pont made a distribution, pursuant to the Judgment, to Taxpayer of 4,830,163 shares of GM common stock.

71. Pursuant to section 301(f) of the Internal Revenue Code of 1954 Taxpayer was required to include the "fair market value" of the 4,830,163 share block of GM common stock in its gross income for the year 1964.

72. In order to determine the "fair market value" of this block of GM common stock, Taxpayer retained Morgan Stanley and Merrill Lynch to make independent appraisals of value of such block of stock. The underwriting firms at that time were asked to determine the value of this block of stock as though no restrictions had been imposed thereon under the Judgment. The diminution in value resulting from such restrictions was therefore not taken into account in the contemporaneous appraisals made by these underwriting firms.

73. Morgan Stanley and Merrill Lynch each concluded that the "fair market value" of the 4,830,163 share block of GM common stock received by Taxpayer on January 6, 1964 would not be accurately re-

flected by the prices paid for GM common stock in New York Stock Exchange transactions on or about January 6, 1964. In their view, such a large block of stock would have a seriously depressing effect on the market and could be sold only at prices substantially below the prices paid for the relatively very small amounts of stock actually sold on the New York Stock Exchange on or about January 6, 1964.

74. Morgan Stanley and Merrill Lynch each further concluded that sales to underwriters for the purpose of secondary distributions would be the only feasible market for such a block of stock and that its "fair market value" should be determined with reference to the price that would be received on such a sale to underwriters.

75. In the opinion of Morgan Stanley, the "fair market value" of the 4,830,163 share block of GM common stock was $352,601,899 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

76. In the opinion of Merrill Lynch, the "fair market value" of the 4,830,163 share block of GM common stock was $354,244,154 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

77. On its Federal income tax return for the calendar year 1964 Taxpayer reported as part of its gross income a value for the 4,830,163 share block of GM common stock received by it on January 6, 1964 based on the average of the appraisals by Morgan Stanley and Merrill Lynch referred to above, *viz.*,

$353,423,027, and erroneously failed to take into account the fact that the "fair market value" of that block of stock was much lower because of the restrictions placed on such block by the Judgment.

78. The "fair market value" of the 4,830,163 share block of GM common stock, after taking account of the effect of the restrictions placed on such block by the Judgment, was not in excess of $318,080,723.

79. The District Director erroneously concluded that the "fair market value" of the 4,830,163 share block of GM common stock should be determined by multiplying by 4,830,163 the average of the highest and the lowest per share prices of the relatively small amounts of GM common stock traded on the New York Stock Exchange on January 6, 1964, and therefore erroneously determined that the "fair market value" of the 4,830,163 share block of GM common stock was $381,582,877.

80. The total refund of taxes due to Taxpayer by reason of the improper and erroneous valuation of the 4,830,163 share block of GM common stock received by it on January 6, 1964 is $4,565,456.55. In making this claim, Taxpayer has given effect to, and set off, an increase of $197,205 in taxes on increased capital gains realized on its sale during 1964 of 400,000 shares of GM common stock out of the block received by it on January 6, 1964 (such increased capital gains being attributable to a correction of the prior erroneous determination of "fair market value", which correction has the effect of reducing the tax basis of such GM shares in Taxpayer's hands).

(A)

THE VALUATION OF GM STOCK RECEIVED BY TAXPAYER.

102. This part of Taxpayer's refund claim for the year 1965 is similar to those parts of its refund claims for 1962 and 1964 set out in paragraphs 10-31 and 69-80 hereof with regard to the valuation of GM stock received by Taxpayer.

103. On January 4, 1965, Du Pont made a distribution, pursuant to the Judgment, to Taxpayer of 6,708,560 shares of GM common stock.

104. Pursuant to section 301(f) of the Internal Revenue Code of 1954 Taxpayer was required to include the "fair market value" of the 6,708,560 share block of GM common stock in its gross income for the year 1965.

105. In order to determine the "fair market value" of this block of GM common stock, Taxpayer retained Morgan Stanley and Merrill Lynch to make independent appraisals of value of such block of stock. The underwriting firms at that time were asked to determine the value of this block of stock as though no restrictions had been imposed thereon under the Judgment. The diminution in value resulting from such restrictions was therefore not taken into account in the contemporaneous appraisals made by these underwriting firms.

106. Morgan Stanley and Merrill Lynch each concluded that the "fair market value" of the 6,708,560 share block of GM common stock received by Taxpayer on January 4, 1965 would not be accurately reflected by the prices paid for GM common stock in

New York Stock Exchange transactions on or about January 4, 1965. In their view, such a large block of stock would have a seriously depressing effect on the market and could be sold only at prices substantially below the prices paid for the relatively very small amounts of stock actually sold on the New York Stock Exchange on or about January 4, 1965.

107. Morgan Stanley and Merrill Lynch each further concluded that sales to underwriters for the purpose of secondary distributions would be the only feasible market for such a block of stock and that its "fair market value" should be determined with reference to the price that would be received on such a sale to underwriters.

108. In the opinion of Morgan Stanley, the "fair market value" of the 6,708,560 share block of GM common stock was $590,353,280 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

109. In the opinion of Merrill Lynch, the "fair market value" of the 6,708,560 share block of GM common stock was $590,688,708 (without taking account of the impairment in value resulting from the restrictions placed on such stock by the Judgment).

110. On its Federal income tax return for the calendar year 1965 Taxpayer reported as part of its gross income a value for the 6,708,560 share block of GM common stock received by it on January 4, 1965 based on the average of the appraisals by Morgan Stanley and Merrill Lynch referred to above, *viz.*, $590,520,994, and erroneously failed to take into account the fact that the "fair market value" of that

block of stock was much lower because of the restrictions placed on such block by the Judgment.

111. The "fair market value" of the 6,708,560 share block of GM common stock, after taking account of the effect of the restrictions placed on such block by the Judgment, was not in excess of $531,468,895.

112. The District Director erroneously concluded that the "fair market value" of the 6,708,560 share block of GM common stock should be determined by multiplying by 6,708,560 the average of the highest and the lowest per share prices of the relatively small amounts of GM common stock traded on the New York Stock Exchange on January 4, 1965, and therefore erroneously determined that the "fair market value" of the 6,708,560 share block of GM common stock was $644,441,045.

113. The total refund of taxes due to Taxpayer by reason of the improper and erroneous valuation of the 6,708,560 share block of GM common stock received by it on January 4, 1965 is $8,055,020.07. In making this claim, Taxpayer has given effect to, and set off, an increase of $78,974.76 in taxes on increased capital gains realized on its sale during 1965 of 125,059 shares of GM common stock out of the block received by it on January 4, 1965 (such increased capital gains being attributable to a correction of the prior erroneous determination of "fair market value", which correction has the effect of reducing the tax basis of such GM shares in Taxpayer's hands).

[Letterhead of]

MURTAUGH, KING, NEIMAN & GRAIS
2650 Board of Trade Building
141 West Jackson Boulevard
Chicago, Illinois 60604

October 31, 1972

Mr. Ronald F. Hunt, Secretary
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

In Re: 812-3224
Application of Christiana Securities Company
and E. I. DuPont de Nemours Company

SUPPLEMENT TO FILED REQUEST
DATED OCTOBER 25, 1972

Dear Mr. Hunt,

Mr. Gribbon of Covington & Burling sent me a copy of his letter of October 27 together with a copy of Amendment No. 6 to the above application. The amendment raises added points which I believe are relevant in considering whether a hearing should be granted. To save time, I have attached herewith copies of pages 2 and 3 of Amendment No. 6 with points of reference noted in the text and on the margin. This will save time in restating and possibly misstating the contents of the amendment.

1. There was nothing in the covering letter of Mr. McCoy or in the S. E. C. notice indicating consideration of the effect of a proposed 13,000,000 plus shares of DuPont being on the market or adverting to this aspect. Though we comment here on the filing as amended by this Amendment No. 6, we wish to point out that no other shareholder

has as much information as a reasonable digest of the filing as now amended would provide.

2. I have only my notes and recollection as to the financial advisors' material. My recollection is that First Boston Corporation did not refer to this point at all, that Morgan Stanley referred to it only in passing as being a matter which they did not analyze. My notes definitely show that Kidder Peabody relied entirely on the applicants' counsel's advice. I quote from my notes with the warning that they might not be exact. *"We have been advised that counsel is not aware of any plans to register or sell DuPont stock, thus (sic) do not anticipate any impact on DuPont. . . ."* Thus the advisors point to counsel for not investigating this and now counsel points to the advisors as "indicating" something. Every "indication" was that the advisors left this matter unexplored. In fact the prospectus prepared after the advisors had filed their opinion furnished a good deal of indication that public offerings are very much in the wind. I believe DuPont is even going to pay for them. Thus the advisors' premised their opinion on assurances and assumptions not presently accurate.

3. "When ignorance is bliss, tis folly to be wise."

4. The proposed ratio which has resulted in a 33% increase in the market value of Christiana since March, 1972, will present the new DuPont shareholders with more than enough extra money to pay all the capital gains taxes. In fact it already has in part and will indefinitely into the future.

5. Assuming the 70% figure is correct, this leaves about 8,000 shareholders of Christiana who will hold over 4,000,000 shares of DuPont unrestricted. In the 1964 General Motors Distribution, this was about the same number

of General Motors shares constituting, however, less than 2% of outstanding General Motors shares. Four million plus shares approaches 10% of all DuPont shares and greatly exceeds 10% of the 34,000,000 presently outstanding shares in non-Christiana hands. Mr. Irénée du Pont, Jr., and Morgan Stanley assert in the tax refund suit that this smaller percentage, less than 2% of a much wider traded stock required a substantial discount because of its impact on the price of General Motors shares. It is submitted that the Commission should request and place in the record the supporting data in the tax case referred to in the Exhibit B of the undersigned Request. Paragraphs 72 to 79 of the complaint attached to this Request has to do with the 4,000,000 plus shares of General Motors. Certainly the undersigned will do everything possible to attempt to introduce such evidence at the time of a hearing.

6. The limitations and restrictions referred to may modify the random selling rights of 8 to 9,000,000 out of the 13,000,000 plus shares of newly issued DuPont, but won't keep them off the market or from overhanging the market. The requirements of future registration present no relevant protection in the present context. Perfect truth will no doubt be fully stated and registration will result without question. Here and now is the time 72% of DuPont shareholders are being asked to sacrifice their financial best interest and the S. E. C. is being asked to find the matter fair and reasonable without a hearing.

7. This is a very relevant approach. The 4,000,000 plus shares which are all unrestricted are equal to or exceed the total volume of all DuPont shares traded in 1971 and of course the full 13,000,000 plus shares either transferable or overhanging the market though "restricted" equal over three years sales volume. This valuable ap-

proach would have been better in the notice already sent and should be fully explored in a hearing in any event.

8. Shareholders should not be asked to depend in this situation on an asserted "belief" so lightly supported and so easily motivated by self-interest of the most obvious sort. A full hearing after a full investigation on the points in this original "Request" and herein stated may clear the air.

9. Suppose Christiana shareholders were involved in a taxable merger here. Can anyone doubt that Wilmington Trust Company and some of the large holders of the newly issued DuPont would be in there fighting tooth and nail with the Treasury over their being required to value DuPont at the market? Morgan Stanley would only have to dig into its old files. Essentially, the same elements affecting value are present here. Only wrapped in silence.

Respectfully submitted:

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib under Declaration of Trust dated 8/30/56.

LCM:sl
Enclosure

The following information relative to potential impact on the market for Du Pont common stock as a result of the proposed merger is submitted by way of Amendment No. 6 to Application in this matter dated July 19, 1972.

In the course of the merger negotiations the Special Board Committees of Du Pont and Christiana considered the possible immediate and longer term effect of the merger transaction on the market for Du Pont common stock, and discussed this aspect of the transaction (including the comments thereon in their reports filed as exhibits to this [1] Application) with the financial advisors. [1] The financial advisors indicated that, in their opinions, there would be no significant or prolonged adverse impact on the market for [2] Du Pont common stock. [2] Pertinent factors relevant to such discussions and conclusions are summarized below:

1. More than 50% of the outstanding shares of Christiana common stock are held of record by Wilmington Trust Company in various fiduciary capacities, principally in trust for the benefit of several hundred individuals and institutions. In addition, a number of individuals hold of record substantial quantities of the shares. Generally, these holdings in trust and directly by the individual stockholders have existed for many years and are in the nature of a long-term investment in the Du Pont Company via stockholdings in Christiana.

   Persons owning Du Pont common stock make their own decisions as to sales of such stock; however, [3] Applicants know of no reason to believe [3] that, upon shift of their long-term investments by reason of the merger from an indirect interest in

Du Pont via holding Christiana common stock to a direct holding of Du Pont common stock, there would be any tendency for a large portion of such Du Pont common stock to be sold by such stockholders. Moreover, the tax basis for the Christiana shares held by such stockholders generally is very low (zero in many cases) due to the impact of the divestiture of General Motors stock by Du Pont and Christiana in the 1960's. As a result, the potential [4] tax effects of sales of such shares [4] represent a substantial deterrent to sales by such stockholders of Du Pont common stock received by them in the [5] merger. [5]

2. The directors of Christiana and certain other stockholders of Christiana may be deemed within the meaning of the Securities Act of 1933 and Regulations thereunder (1933 Act) to be "affiliates" of Christiana. As a result, such persons will be restricted by the 1933 Act with respect to disposition of shares of Du Pont common stock received by them in the merger. Du Pont has determined that it will treat Wilmington Trust Company as so restricted with respect to disposition of certain of the shares of Du Pont common stock it receives in the merger.

[6] Based on information currently available, [6] it is anticipated that approximately 70% of the Du Pont common stock to be issued in the merger transaction will be subject to the foregoing restrictions which will prevent their sale to the public other than pursuant to an effective registration statement filed under the 1933 Act or in "brokers' transactions" as defined in the 1933 Act.

The applicable restrictions will be specified in agreements to be entered into between Du Pont and each stockholder of Christiana who will receive such restricted stock. These agreements will provide for restrictive legends to be placed on certificates for shares issued to such stockholders in the merger, and will further provide that such legends may be removed only to permit sale of such shares pursuant to an effective registration statement filed under the 1933 Act or upon receipt of an opinion of counsel satisfactory in form and substance to Du Pont that registration is not required under the 1933 Act to permit sale of such shares.

Certain registration rights will be afforded to the stockholders under these agreements, limited so as to permit registered sales of restricted shares only 1) during the months of April and October of each year in any lawful manner other than a firm commitment underwritten offering and 2) at one other time during each year in a firm commitment underwritten offering of at least $25 million in then current market value of such shares. No other public sales of the restrictive shares would be permitted, except in "brokers' transactions" as defined in the 1933 Act, which transactions may not exceed, for any person in any six-month period, approximately one week's reported trading volume in Du Pont [7] [8] common stock. [7] Applicants believe [8] that these limitations on public sale assure that any public sales of Du Pont common stock to be issued in the merger would occur in an orderly fashion without significant or prolonged adverse impact on the market for Du Pont common stock.

[Letterhead of]
MURTAUGH, KING, NEIMAN & GRAIS
2650 Board of Trade Building
141 West Jackson Boulevard
Chicago, Illinois 60604

November 14, 1972

Mr. Ronald F. Hunt, Secretary
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

In Re: 812-3224

Application of Christiana Securities Company
and E. I. DuPont de Nemours Company

SUPPLEMENT TO FILED REQUEST DATED
OCTOBER 25, 1972

Dear Mr. Hunt:

On Page 6 of the Commission's Notice of Filing dated October 3, 1972 interested persons were advised they might request a hearing and submit reasons. The original Request of the undersigned was filed October 26, 1972. A copy of Amendment No. 6 of the applicants dated October 27, 1972 was received on October 30 and a supplement in response to the Amendment dated October 31, 1972 has heretofore been sent by the undersigned. Deeper concentration on the content of Amendment No. 6 together with some collateral research which turns out to have serendipitous relevance prompts me to presume on the patience of all by adding to the support of the reasons heretofore stated.

In preparing for a trial in a current estate tax refund case now pending in our local Federal Court, I find a case in point on the valuation of the reversionary interest in the Steib Trust of which I am successor trustee, which trust owns, among other assets, 400 shares of DuPont. This reversionary interest is part of the estate of the late David B. Maher, who created the Steib Trust.

The case is *Henry F. DuPont vs. Commissioner (1943) 2 Tax Court 246.* It appears that Henry F. DuPont created a trust in 1927 to pay income to his sister, reserving powers as to the remainder, which, tax-wise, were determined to be equal to a reversionary interest for himself. When he released these powers on January 4, 1939, the release was determined to be a taxable gift by him of the reversionary interest. The question of the valuation of the reversionary element in the gift involved actuarial matter germane to my local tax refund suit, but, relevant to the above application, is that there is detailed attention given to the valuation of the only asset held in trust namely 52,900 shares of DuPont which was 4.8% of the then outstanding 11,065,717 shares. The court considered among other things a table presented by Mr. DuPont's counsel showing the total shares traded in 1938 (826,000) which was about sixteen times the DuPont trust block. This was presented to demonstrate that 52,900 shares relative to the market would greatly depress all shares if sold and therefore should have a discount for gift tax valuation.

In this application, we have thirteen million shares which is 28% of the 47,500,000 outstanding DuPont and over 38% of the shares presently on the market (non-owned by Christiana). The 1971 sales volume, four million or so, related to the thirty-four million available DuPont shares is not too much different than the 1938 volume of 826,000 out of 11,065,717 shares considering Christiana probably had the same proportion of DuPont frozen. But, here we

are considering addition to available shares of three times the yearly volume of 1971 sales as against 6% of the yearly volume in the *DuPont* tax refund case referred to, which was claimed to have and was accorded much significance.

There was a considerable amount of other evidence, of a type which should be considered here, as to the valuation of such a large number of shares proposing larger discounts, but as against the government's claim for quoted market value, the tax court concluded that the value of each share of stock (before applying actuarial data) was $135.00 per share $18.00 below market or 13% below the market price.

Even the most conservative speculator as to possible added sales resulting from the proposed merger would not sponsor a suggestion that at least 4.8% of the new DuPont Shares would not be added to the market annually for some time. In fact, if the new DuPont was only sold on the same ratio as sales out of the thirty-four million marketable shares were sold in 1971, roughly 10%, there would be 28% more shares for sale than in 1971. In the *DuPont* Case referred to, a quantity of shares equal to six percent of the previous years sales volume was involved.

Here, if the 13 million added shares were only sold at the 1971 ratio of DuPont shares (about 10% of all shares) 1,300,000 added shares will be sold or about 33% of the 1971 volume. This is more than six times the relation of shares to volume which was held to warrant a 13% market discount in the *Henry F. DuPont* case, with which I agree.

Of course, there will be more, much more, than 10% of the new DuPont shares sold in the first year as well as in near years to come, and the "water torture" method of selling restricted stock may present an overhang situation worse than if selling intentions of the holders of all 13 million new shares were executed at will. It isn't hard to

visualize security analysts, presently asleep (sedated?) at the switch, adding this to their future cautionary dicta.

The undocumented generalities at the bottom of Page 2 of Amendment No. 6 about the deterrent effect of tax consequences, do not take into account that du Ponts as well as the entire preceding generation of my wife's family since they acquired DuPont forty-eight years ago, have been bequeathing and giving away Christiana stock and the new holders have a new basis. This certainly applies to the 56% held in trust. In addition many of the trusts are charitable and many of the holders are charities and charitable foundations. The tax benefits of giving appreciated stock in one form or another have been widely advertised by charities for years. Some times (until the Tax Reform Act of 1969) you could get a full deduction and pocket money net. (Will anyone who believes the du Ponts do not get good tax advice Please apply for a free dunce cap?) Charities, charitable foundations and charitable trusts will have no tax deterrent problems, except possibly some created by the Tax Reform Act which may accelerate a trust's or charitable foundation's need to sell. (Information please?).

Speaking of trusts, certainly Wilmington Trust Company, as Trustee, will have the most outstanding track record of the year among the nation's fiduciaries as it records the 33% growth in du Pont family trust portfolios, its 56% of the bounty or booty from the half billion dollar coup. DuPont shareholders may well be envious and reflect: "Wouldn't it be great if we had a fiduciary like that—a real McCoy."

• • •

How can DuPont undertake to prosecute the Christiana tax case when any success that results comes out of the 188,000 shares added to DuPont's treasury to

validate the merger? Is is not the duty of DuPont to protect the shares in its treasury? It can do it very well by using the same contentions as are made in this context. How can DuPont whistle one tune in the tax case about the affect of a much smaller blockage added to the market and whistle another tune to the S. E. C. and to DuPont shareholders about the slight affect of 13 million shares added to the market?

Respectfully submitted,

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh,
Trustee for Emanuel and Helen
Steib under Declaration of
Trust dated 8/30/56.

LCM:me
Enclosure

cc: Mr. Daniel M. Gribbon
Covington & Burling
888 Sixteenth Street, N. W.
Washington, D. C. 20006

Mr. C. B. McCoy, Chairman
and President
E. I. DuPont de Nemours & Company
Wilmington, Delaware 19898

Exhibit B
To Application of Lewis C. Murtaugh,
as trustee to intervene
(case 812-3224)

I undertake to supply to the record of this case a concise summary of the relevant case of *United States vs. E. I. Du Pont De Nemours, General Motors Corporation, Christiana Securities Corporation and Delaware Realty & Investment Corporation, Civil Action No. 49C1071* in the United States District Court for the Northern District of Illinois, Eastern Division and to add some thoughts to what was expressed on this in Exhibit A(1) P 5-7. The suit charged that the acquisition of 23% of General Motors Corporation by DuPont shortly after World War I violated the Sherman Act and the Clayton Act. The case was assigned to Judge Walter J. LaBuy who heard thousands of pages of testimony and received a multitude of exhibits.

Judge LaBuy's decision that the government had failed to prove a violation of either Act is reported in *126 F. Supp.* 235 and the Supreme Court's reversing finding of a violation of the Clayton Act is reported in *353 U. S. 586.* The Supreme Court opinion referred the matter back to Judge LaBuy to make a decree consonant with its decision i.e. to resolve the existing situation so that there would be no violation.

On the remand the government asserted that only divestiture was a solution. On the other hand the defendants contended that the voting control was the key element in the violation and that passing through the votes of DuPont and Christiana and Delaware to their individual shareholders was a reasonable solution, since the control element would be dissipated. At defendant's urging, the government presented a proposed decree which pro-

vided for a distribution of the 63,000,000 shares of General Motors over a ten year period to the shareholders of DuPont but required the Christiana and Delaware Trust shares to be sold roughly at the rate of 2 million shares a year with a little leeway. There were a little over 19 million shares thus involved. The balance of the shares, roughly 44 million were to be distributed to shareholders other than Christiana and Delaware as a stock dividend. Being in the stock of another company, the distribution would under ordinary income tax principles be taxable as dividends. Concurrently there had been relief legislation in Congress to mitigate the tax effect but no law had been adopted prior to the conclusion of the hearing by Judge LaBuy on remand.

Judge LaBuy eventually accepted the defendant's suggestion of a pass through of voting rights without divestiture due to the depressing effect on 23% of outstanding General Motors shares being added to the market even on a ten year installment basis. His opinion is found at 177 F. Supp. 1. The hearings on this first remand are the *meat* of the pertinence and relevance on this DuPont Christiana Merger issue as well as the arguments on appeal.

To hurry through the original case, on appeal the Supreme Court reversed Judge LaBuy again holding divestiture necessary, gave some ground rules and again sent the matter back to Judge LaBuy (366 U. S. 316).

Thereafter a decree was entered by the Judge, whereunder the 1.37 shares of General Motors for each share of outstanding DuPont held in DuPont's treasury was distributed to DuPont shareholders ½ share in 1962, .37 of a share in 1964, and ½ share in 1965. These distributions were not taxable to ordinary DuPont shareholders within certain limits because of remedial legislation which had by then been adopted but they were taxable to Christiana,

which had by then merged with Delaware Trust. To comply with mandate of dispersing control or influence over General Motors, Christiana was not allowed to pass the General Motors shares it received through to its largely DuPont family interests, but it was required to otherwise dispose of them which it did by 1966. Christiana was not included in the legislative tax relief and claimed it was entitled to a substantial discount from the market value of General Motors shares for tax purposes because of the large number of shares it received on each distribution. This is all set out in Exhibit B to Exhibit A(1) attached hereto and not repeated here. It eventually paid a big deficiency and sued for a refund which matter is a part of the elements of this merger, and is still to be resolved. It has much pertinence here as argued in Exhibit B to Exhibit A(1) attached hereto.

Judge LaBuy's decision on the first remand followed about 25 days of hearings. More than half of these were parading to the witness stand of senior people of Morgan Stanley, Merrill Lynch, First Boston Corporation, distinguished economists, bank presidents, trust department heads and others who testified that the ten year plan of 2 million shares a year sales by Christiana plus what would be sold by shareholders out of the 4,400,000 shares they would receive each year, plus what would be sold by other General Motors shareholders in dismay at all the above mentioned selling, would drive General Motors share down until bargain basement buying would come in and the overhang of future sales would relentlessly keep General Motors shares depressed. Since at that time no tax relief had been enacted the selling to pay taxes was prominently featured, but not exclusively relied upon for the down push on General Motors share values. Since Christiana was not given Tax relief its pending claim and suit for

refund is a cognate issue without blemish and the need for discovery on this is obvious. Even the issue before Judge LaBuy on the first remand is close because the prime emphasis was on the effect of sales on General Motors shares, whether for tax or other purposes.

After the facts put in issue by Amendment No. 6 of the application for Exemption are thoroughly outlined we will be better able to judge the overhang effect of the restrictions. The briefs, testimony and documentary evidence on market effect in the first remand hearing before Judge LaBuy is dated but should be useful (and cheap).

There is much that are admissions and material for cross-examination, and much may be updated by material in the current tax refund suit by Christiana. General Motors is about the most widely traded stock on the New York Stock Exchange. If putting out very small percentages a year could potentially have the major effects testified to by General Motors and DuPont interests, what effect should 28% of a stock traded not ten percent as much as General Motors have?

Exhibit C

November 22, 1972

Cyril V. Smith Jr.
Covington & Burling
888 Sixteenth St. N.W.
Washington, D. C. 20006

Dear Mr. Smith:

Thank you for the copy of the Memorandum recently filed with the SEC.

In an attempt at constructive thinking could you, from data Christiana has or could easily accumulate, give me a table of figures showing the number of Christiana shareholders with:

Less than 100 shares .....
100-300 shares .....
300-500 shares .....
500-1000 shares .....
1000-5000 shares .....
Over 5000 shares .....

Any available classification that approximates this above information will be adequate and much appreciated.

Very truly yours,

/s/ Lewis C. Murtaugh

LCM/me

Administrative Proceeding
File No. 3-3928

—

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
(812-3224)

—

MOTION TO MODIFY ORDER FIXING PRE-HEARING PROCEDURES

On January 11, 1973, an ORDER FIXING PRE-HEARING PROCEDURES was entered, a copy of which was received on January 17, 1973. This motion by Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib under declaration of Trust dated 8/30/56 (hereafter called Movant) is to modify this order for the following reasons:

1. Movant filed, within the time scheduled by the order setting the hearing, namely January 15, 1973, his application for leave to intervene as a party pursuant to rule 9 (e). The application is incorporated by reference at this point for consideration in connection with this motion.

2. It can be noted that Paragraph 5 of Movant's application sets further numerous matters as to which discovery is desired. The witnesses that will be called and the exhibits that will be prepared will be largely responsive to the material produced on depositions, interrogatories and further depositions and interrogatories which may be required by the earlier ones.

3. As an example, it is clear from the application, that Movant expects to make meaningful use of material presently in the control of the Applicants for Exemption. If Movant does not have this material, he cannot make adequate objections or conduct cross-examination at any hearing which is held.

4. The Rules of Practice of the Commission have provisions for discovery, interrogatories, subpoenas and so on which indicate that interested parties are not to be forced to hearing without being given an opportunity to be prepared. Movant wishes to take advantage of this opportunity to be prepared. As set forth in Movant's application he does not believe that he has the right to fully exercise the privileges of pre-hearing discovery which are provided for in the rules unless he has the status of a party. Further as he reads the rules, Rule 14 (b)(1) he does not even have the right to have a subpoena issued.

5. There may be some useful purpose served by having the Applicants for Exemption put in their case *under certain stipulated conditions.* This would undoubtedly save a great deal of pre-hearing discovery and focus issues which may be conceded or disputed. After that opposing parties will still need time for discovery and interrogatories, hopefully, however, much reduced.

6. The stipulated condition referred to in the preceding paragraph which it is submitted are essential before the hearing commences is that the right to cross-examine witnesses presented by the Applicant for Exemption and to object to exhibits be preserved to a time and adequate opportunity has been afforded to make necessary discovery. Of course Applicants for Exemption will not be deemed to have completed or concluded their presentation in the event some opposing material is introduced.

7. What is proposed, if the hearing *must* go ahead on February 5, is that Applicants proceed to make a *prima*

facie case,[1] that persons in attendance be allowed to cross-examine and object to the extent that they wish, but that such participation by parties shall not be deemed to be finished even as to witnesses cross-examined, until remaining discovery is completed and the necessary research. At a minimum, Movant estimates that 45 days after such initial hearing or after he has been given the status of an intervenor will be required to develop the necessary discovery and that assumes a change of attitude. (Note the unanswered letter of November 22, 1972, Exhibit C to Movant's Application to Intervene.)

8. Movant does not seek to excuse the Applicants for Exemption from the ambit of the order of January 11, 1973. If they wish such release, they can move to obtain it. In view of the burden they have and their apparent readiness, it would help clarify matters if advance information such as provided for in the order were given outsiders. Really, what will be presented in opposition does depend on the nature of the evidence in justification. This is clearly a voidable transaction without ample justification due to the enrichment of insiders which will result.

1. Applicants for Exemption have a stern burden. Many cases cited in and citing *Pepper v. Litton*, 308 U. S. 295 are in point. In *Pepper*, the court said, at page 306: (all emphasis added) "A director is a fiduciary. Twin-Lick Oil Company v. Marbury, 91 U. S. 587, 588, 23 L. Ed. 328. So is a dominant or controlling stockholder or group of stockholders. Southern Pacific Company v. Bogert, 250 U. S. 483, 492, 39 S. Ct. 533, 537, 63 L. Ed. 1099. Their powers are powers in trust. See Jackson v. Ludeling, 21 Wall. 616, 624, 22 L. Ed. 492. Their dealings with the corporation are subjected *to rigorous scrutiny* and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation *and those interested therein*. Geddes v. Anaconda Copper Mining Company, 254 U. S. 590, 599, 41 S. Ct. 209, 212, 65 L. Ed. 425. The essence of the test is whether or not under all the circumstances the transaction *carries the earmarks of an arm's length bargain*. If it does not, equity will set it aside."

9. Movant is prepared to spend a couple of days in either Washington or Wilmington at Applicants' choice near an available copying machine to review the material that can be made available prior to February 5, 1973, which is described in Paragraph 5 of Movant's application. Movant will hold himself in readiness to be in Washington or Wilmington as Applicants wish on the 25th and 26th or the 30th and 31st of January. Short notification is requested.

10. It would seem that the provisions of Rule 8 (d) might expedite matters, especially if the preliminary discovery referred to in the preceding paragraph is accorded and a request for such a conference as is therein provided is hereby made.

11. Movant specifically objects to any hearing on February 5, 1973, unless a favorable ruling is made on Movant's application to intervene and moves, in the event of an unfavorable ruling, to continue said hearing to a date subsequent thereto, which will provide time for an attempted interlocutory review.

Wherefore, Movant respectfully moves that he be excused from complying with Paragraphs 1 and 2 of the order of January 11, 1973. Actually it seems Movant is covered under Paragraph 3, but since he received notice of the order, he feels impelled to make this motion.

/s/ LEWIS C. MURTAUGH,
LEWIS C. MURTAUGH, TRUSTEE FOR
EMANUEL AND HELEN STEIB
UNDER DECLARATION OF TRUST
DATED 8/30/56.

Lewis C. Murtaugh, Trustee
141 West Jackson Blvd., Room 2650
Chicago, Illinois 60604
312/939-2880

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served by air-mail, postage prepaid, on each of the following:

Sidney Ullman
Administrative Law Judge
1011 L Street, N.W.
Washington, D. C. 20005

Division of Investment Company Regulation
Securities and Exchange Commission
Washington, D. C. 20549

Covington & Burling
888 - 16th Street, N.W.
Washington, D. C. 20006

Dechert Price & Rhoads
1600 Three Penn Center
Philadelphia, Pennsylvania 19102

Richard J. Collins, Jr.
314 North Broadway
St. Louis, Missouri 63102

January 18, 1973

/s/ LEWIS C. MURTAUGH,
MURTAUGH, KING, NEIMAN & GRAIS,
141 West Jackson Blvd., Room 2650,
Chicago, Illinois 60604,
312/939-2880.

Administrative Proceeding
File No. 3-3928

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
January 26, 1973

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)
Investment Company Act of 1940

REPLY OF APPLICANTS TO MOTION TO MODIFY ORDER FIXING PRE-HEARING PROCEDURES.

On January 11, 1973, the Administrative Law Judge entered an Order Fixing Pre-Hearing Procedures for the purpose of expediting this proceeding. The Order provides that Applicants and persons theretofore requesting a hearing, including Lewis C. Murtaugh, file by January 22, 1973, lists of witnesses and statements of the subject matter of their testimony as well as lists of proposed exhibits, and further that such persons file summaries of testimony and copies of each exhibit by January 29, 1973. Mr. Murtaugh has moved to be relieved from these provisions. Applicants oppose his motion on the grounds that compliance with the schedule designated by the Administrative Law Judge is necessary to provide an orderly and expeditious manner for presentation of evidence at the hearing, and that Mr. Murtaugh has had ample time to prepare for the hearing.

Mr. Murtaugh received the Notice of Application which was published by the Commission on October 3, 1972, and mailed on October 4 to every stockholder of

Du Pont. Mr. Murtaugh has demonstrated his interest in this matter by filing numerous statements with the Commission since such receipt. He has had the opportunity over several months to examine the Application in this case and it is apparent from the papers he has filed that he has done so. Mr. Murtaugh was promptly served with a copy of the Commission's Order of December 13, 1972 fixing the February 5, 1973 hearing date, and similarly was served with a copy of (but filed no timely objection to) Applicants' December 21, 1972 Motion to Establish Pre-Hearing Procedures. Under the circumstances, Applicants do not believe there is any justification for granting Mr. Murtaugh relief from the Order Fixing Pre-Hearing Procedures. He has had ample opportunity to prepare for the hearing and the presentation of his case.

For the foregoing reasons, it is respectfully requested that the Administrative Law Judge deny the Motion of Lewis C. Murtaugh to Modify the Order Fixing Pre-Hearing Procedures.

Respectfully submitted,

/s/ PETER B. ARCHIE
Daniel M. Gribbon
Cyril V. Smith, Jr.
Peter B. Archie
Counsel for
E. I. du Pont de Nemours
and Company

Covington & Burling
888 Sixteenth Street, N. W.
Washington, D. C. 20006

KENNETH W. GEMMILL
(by pba)
Kenneth W. Gemmill
Stephen R. Miller
Matthew J. Broderick
Richard S. Seltzer
Counsel for
Christiana Securities
Company

Dechert Price & Rhoads
1600 Three Penn Center
Philadelphia, Pennsylvania
19102

CERTIFICATE OF SERVICE

The undersigned attorney for E. I. du Pont de Nemours and Company hereby certifies that on January 26, 1973, the foregoing "Reply of Applicants . . ." was served (1) by hand on the Division of Investment Management Regulation, and (2) by depositing copies thereof in the United States mail, postage prepaid and properly addressed, to the following persons who have requested participation in the proceedings: Mr. Richard J. Collins, Mr. Ernest N. May, Mr. Daniel W. Maher and Mr. Lewis C. Murtaugh.

/s/ PETER B. ARCHIE
Peter B. Archie

Administrative Proceeding
File No. 3-3928

—

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
January 29, 1973

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)
Investment Company Act of 1940

—

REJOINDER TO REPLY TO MOTION TO MODIFY ORDER.

Movant, Lewis C. Murtaugh, as Trustee, has received the reply of Applicants for Exemption to Movant's motion to Modify Order, fixing prehearing procedures, which was entered on January 11, 1973, a copy of which was received by Movant on January 17, 1973.

There seems to be an implication in the reply that Movant was specified by name in the order referred to which of course is not the case.

In the priorities reasonably related to this entire matter, all of Movants energies were directed prior to January 12, 1973, when his Application for Leave to Intervene was dispatched, to preparing said application. This was in compliance of the order provided for the hearing which gave parties until January 15, 1973, to file.

On the question of diligence, Movant has this to report: On December 14, 1972, Movant went to Washington, obtained a copy of the order entered the previous day, went to the public reference room of the Commission and

there ordered one week scheduled delivery copy of the entire file. This was my second trip to Washington on this matter. Unfortunately the order was mired in holiday delays and was not mailed from Washington until January 3, 1973, being received by Movant on January 5, 1973. This is in answer to the statement that Movant has had the opportunity of several months to examine the application. Movant's opportunity for examination was confined to his original visit to Washington October 19, 1972, and on his immediate visit to Washington after the order granting a hearing on December 14, 1972. Movant asserts it is apparent that a prodigious amount of time and energy has been devoted to this matter. There simply was no time to drop everything and reply to Applicants December 21, 1972 motion.

Finally hearing from Mr. Gribbon of the firm of Covington & Burling on the afternoon of January 23, 1973, Movant has arranged to go to Washington for two days, namely January 30 and 31, 1973, to expedite matters by seeing what documentation Applicants are able and willing to expose. There has not only been no "ample opportunity" but there has been no opportunity to prepare this matter and there is no possibility of Applicants presenting his case on or consecutively after February 5, 1973, for reasons already stated.

Movant's motion indicating that he may be resigned to having the hearing proceed on February 5, 1973, *under the conditions set forth in the motion* should not be construed as a waiver of his undoubted right to be prepared in this extraordinary situation which involves probably as much in dollar terms of alleged over-reaching as has concerned the Commission in total in several years. This matter simply cannot be hurried. Full discovery must be had and Movant intends to use every means in his hands to insure this end and to bring out all of the evidence, 95% of which is in control of the Applicants for Exemption.

By Wednesday evening, January 31, 1973, Movant will have a better understanding of the extent to which the Applicants intend to produce evidence relating to this awesome affair.

Respectfully submitted,

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh, Trustee for
Emanuel and Helen Steib Under
Declaration of Trust Dated 8/30/56

Lewis C. Murtaugh
Murtaugh, King, Neiman & Grais
141 West Jackson Blvd. Suite 2650
Chicago, Illinois 60604
312/939-2880

CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing Rejoinder to Reply to Modify Order was served by air mail, postage prepaid, on each of the following:

1. Division of Investment Company Regulation
   Securities and Exchange Commission
   Washington, D. C. 20549
2. Covington & Burling
   888 16th Street, N.W.
   Washington, D. C. 20006
3. Dechert Price & Rhoads
   1600 Three Penn Center
   Philadelphia, Pennsylvania 19102
4. Daniel W. Maher
   1136 Canyon Drive
   Upland, California 91786
5. Richard J. Collins, Jr.
   314 North Broadway
   St. Louis, Missouri 63102

January 29, 1973

/s/ LEWIS C. MURTAUGH.
Lewis C. Murtaugh.

MURTAUGH BRIEF, p. i

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opening Statement	1
1. The Insider Enrichment Here Required a Thorough Investigation and Hearing	2
2. There Was Inordinate Haste and Incomplete Scrutiny in Disposing of this Matter	3
3. The Abandoned Liquidation Alternative Controlled the Area of Discount and the So-Called Other Precedents Make No Sense in this Context	6
4. The Evidence Shows that the Proposed Merger Will Adversely Affect the Market Price of DuPont Shares and that it is Not in the Best Interests of DuPont Shareholders Othen Than Christiana	9
4a The First Occasion	13
4b The Second Occasion	36
4c The Third Occasion	40
5. There is No Worthwhile Evidence to Negative the Likelihood of Adverse Market Impact From the Merger or Succeeding Sales	46a
6. There Should Be a More Favorable Merger Ratio to DuPont Shareholders to Be Fair	52

7. Fiduciary Obligations Have Been Breached By the Obtaining of an Inordinate Profit Through Controlled Corporate Action and By Not Protecting the Market For DuPont Share Values	54
8. The Law Does Not, Absent Grave and Present Corporate Need, Approve the Use of Corporate Shares to Shift or Protect Control	55
9. This Merger, As Proposed, Should Not be Approved	58

MURTAUGH BRIEF, pp. 45-51

the veil from what I assume is an assertion on the part of Christiana that General Motors shares are still hurting from the DuPont distributed shares. In other words, that the impact is still there. General Motors now sells at ten times earnings. In the letter of Morgan Stanley dated January 29, 1965, (the next to last page) the mean price earnings ratios of General Motors for the years 1955 to 1964 is given. In 1964 the mean price earnings ratio was 14.9%. Now its around 10 (Murtaugh Exhibit 13).

The Third Occasion Morgan Stanley letters did not hesitate to turn, not to sales on the Exchange, but to the underwritten secondaries as the only way to derive the highest value. It chose a single secondary but considered two or more as possibilities, discarding successive secondaries however because of negative overhang. I accept secondaries', best efforts or underwritten, as the best way to liquidate the four, five and six figure blocks of DuPont that Christiana shareholders will receive if the merger is approved. But each competes for demand and increases supply.

It is true that the issue of blockage valuation° has its special features, for example, it does not cast its shadow before it as in the case with secondaries. But when the market is receiving the secondary and reacting to it at the time of reception and reacting thereafter, the issue is exactly the same as is faced by the person appraising a blockage situation. The effect of a merger is also similar, in fact, probably worse. In a secondary, once it has been marketed, the stock has been voluntarily purchased. In a

° The case of *Henry F. DuPont v. Commissioner*, (1943), 2 Tax Court 246, is in point, legally and economically. There the gift tax value of 4.8% of all outstanding DuPont shares was involved. There was a good deal of evidence on market effect and a value of $135.00 was adjudicated. This was $18.00 or 13% below the quoted market value. The evidence and opinion is instructive and pertinent.

merger, sales are yet to come. This merger mortgages the future of DuPont share values. A great many analysts will not be so obtuse as to disregard this when the merger is made final even before the secondary sales make their impact on the market, and when the secondaries start coming they will be reminded that there is more to come from the huge blocks of Christiana holders. To say the market is so resilient, it will keep bouncing back is not demonstrable without making many assumptions as to unknown factors as Murtaugh's Exhibits prove to the hilt. And certainly isn't proved by showing a return to previous value after a month or two or three in a particular instance. The Christiana refund file, if I can get at it, I believe, will show Christiana is making the claim today that General Motors is still suffering from the shares distributed in blocks to large DuPont holders. I agree with Christiana in this contention and I affirm that it is an incredibly naive or dissembling attitude to claim that the impact problem doesn't exist in this situation looking to the future if not to the immediate present.

5. THERE IS NO WORTHWHILE EVIDENCE TO NEGATIVE THE LIKELIHOOD OF ADVERSE MARKET IMPACT FROM THE MERGER OR SUCCEEDING SALES.

In its report filed as an Exhibit to the Application for Exemption and introduced into evidence, the sole reference of Morgan Stanley on the question of market damage, was quoted in Charles Townsend's testimony (Tr. 53). There was nothing in the Application for Exemption on this point so nothing digested in the Commission's condensation which was sent to shareholders. The sole reference in the extensive Morgan Stanley report was the deterrent affect of potential capital gain taxes on sellers. This is garlanded in the record by the testimony of Mr. Charles Townsend (Tr. 53 to 56). He had no doubt that some stockholders

would obviously sell (Tr. 56), but if holders of large blocks chose to sell, for instance if some of them died and their bases moved and they had to pay estate taxes, they would sell through underwritten public offerings. "Now underwritten public offerings do have market effects. We know that. But these if done in a proper manner are modest in size and not extensive in length (Tr. 56), all this statistically unverified deductions he recited "led us to make if you will an informed (sic) judgment that there would not be a material or lasting effect on the market for DuPont." After discussing a series of secondaries in joint Exhibit 6, he concludes, that in organized secondary offerings there is frequently an adverse market impact. But if the offering is done well and made properly, this impact will disappear over a period of time following the issue. (Tr. 64) Getting concrete, he estimated a one to three month impact (Tr. 65) from marketing 10% of DuPont over a five year period which would be dissipated after each issue (Tr. 65). Provided the market was not overtaxed, there would be no lasting impact (Tr. 66).

Mr. Charles Townsend has the cool calm air of a man with all the answers but with enough good legal advice to use weasel words, make many assumption, assume a good market, assure Morgan Stanley would control, overlooking the fact that on best efforts offerings, there is no control at all, assuming that there would be no mishaps between the time of registration and the time a secondary reaches the market, assume that there will be no succeeding sales before the market effect of a prior selling is abated, assume there will be no helter skelter selling by the 4,000,000 shareholders of DuPont which will not be in any way affiliated or controlled,* assume that the 20% owned by

* Mr. Grimes testified that no attempt was made to determine the selling intentions of owners of the 4,000,000 non-affiliated shares (Tr. 657). The looseness of the ascertainment of sellers intentions of affiliates is appalling (Tr. 669).

charities would not be sold even if there is no tax deterrent, assume that no trusts would be diversified, assume there is a good market for DuPont at around the current price at any time, or if not that the demand will be generated somehow within a very short period to restore the price even though a person who is interested in DuPont knows that he can wait for the next market impact situation, and finally assume there won't be any sales any how, without any real basis or investigation such as his firm made for the Relief Proceeding. We realize Morgan Stanley are professional gladiators in this field, serving DuPont in one case, the divestiture (lots of impact), serving DuPont in an opposite stance, in this case (no impact) and serving Christiana in the refund case (lots of impact). Everything is predictable in this case with calm assurance. In the other instances at best you never can tell when the probabilities are that there will be damage. (A word might be said for that DuPont shareholder, whether a former Christiana shareholder or not, who has to sell his shares for personal reasons or feels he has to during the period of market impact. He was very much the object of sympathy in the Relief Proceeding but is disregarded here). Mr. Edward Townsend of First Boston Corporation said he relied on the advice of counsel for the other side for the fact that no one knew of any selling intentions, that it was a pure guess on his part as to what actual inquiries had been made (Tr. 402). There is no mention of market significance in his report. It seems clear that he was asked to do a segment of the job making the assumption as to terms apart from whether or not there would be market sales.

The Kidder, Peabody Report states that counsel is not aware of any plans to register and sell DuPont. This simply indicates no affirmative information at all. It also weakly draws an inference of no profit taking from a lack of volume of Christiana shares, when the merger caused

a rise in Christiana prices. This is rather absurd since the rise never reached the merger ratio. However Kidder Peabody did not go out on a limb in their report, because in the Exhibit 2 to its financial statements accompanying the report there is the following language: the report assumes "that there will be no registration and subsequent sales of DuPont stock received in the merger by major Christiana shareholders".

Mr. McCoy's testimony on cross-examination dealing with sellers and market impact begins on Page 944. He knows of no survey (Tr. 940). He knows that there are only 332 shareholders of Christiana who hold over a thousand shares and 99.5% of the outstanding Christiana shares (Tr. 945), but he personally wouldn't answer any questions about selling near term (Page 941) (and so wouldn't dream of asking presumably under the golden rule). See also Shapiro (Tr. 788). He testified that he was satisfied that the merger would not have a harmful market effect (Tr. 948) though it is not based on any study. He doesn't think anybody could answer on harmful market effect or that anything could be done to produce greater certainty. (Tr. 948) DuPont had no trouble on the First Occasion, the Relief Proceeding, making all sorts of studies. The evidence put in by the Applicants for Exemption which is in the record is puny on the market impact issue and Amendment No. 6 filed after the notice and after my Request for Hearing stating that the special board committees had considered the possible immediate and longer term effect of the merger transaction and discussed this aspect with the advisors and received opinions, then there would be no significant or prolonged adverse market impact on the market for DuPont shares as contrived and unsupported in the reports and in testimony. The issue was buried, avoided and not considered at all.

If there was even a little diligence or sense of responsibility for getting some of the big holders on the dotted line agreeing to withhold substantial percentages for a period with escape clauses such as for death and taxes, there might be some argument that consideration had been given the security of the price of DuPont in the market, though then still would be the problem of a company business purpose and an arms length price. In fact, if the Commission as to this aspect conditions its approval on there being a supplementary provision in the agreement with respect to affiliated shares which will put in writing what is being asserted in the record, this would be a very affirmative thing. The affiliates are to sign agreements with respect to registration in any event. I tried to lay the groundwork for this suggestion with my unanswered letter of November 22, 1972, (the last sheet of my Application for Leave to Intervene as a Party). The agreement with respect to registration is full of great privileges, and instead of being a protection for the market of DuPont shares indicates ominously that there will be, at DuPont's expense, much recourse to the market and that the financial community will soon learn and correctly appraise the situation. There seems to be some desire to persuade the Commission that the agreement for half-yearly registrations will only result in sales on the New York Stock Exchange. This no doubt is to get rid of the unfavorable inference of too often replated secondaries. However, the record clearly shows that this is not true. (Tr. 663)

MURTAUGH BRIEF, p. 58

Mr. McCoy was evasive to say the least about the control transfer by Christiana, or acquisition of control by management. His testimony on this begins on cross-examination at Page 930. However, he did volunteer that management had no reason to be concerned about lack of power. The management had the power. A raid from someone acquiring Christiana or Christiana shares is a possibility. On direct examination Mr. McCoy said that he saw the merger as a solution to a long time problem, breaking up the Christiana block so that somewhere down the line it could not fall into factional groups. He said Christiana doesn't control, and issues no instructions, mandates, or vetoes. (Tr. 886).

In fact therefore, there is no real business purpose for DuPont here other than the protection of the unthreatened present and future management. The enhancement of their power or the elimination of potential management control is all without any demonstration of a need for the business but just a very far off down the road feeling that somehow things might be more comfortable.

9. This Merger As Proposed Should Not Be Approved.

It is quite understandable that the two members of the DuPont Special Committee should be especially sensitive to abating the power that threatens or potentially threatens the men at the top, (that's them, at this moment) and should easily translate this sensitivity into terms of tangible company advantage. It is also understandable that courts and agencies, and even some minority stockholders, will not indulge them in their understandable conscious or subconscious anxieties or ambitions. In order to sublimate they turn their stance into a moral issue,—it would be overreaching to demand part of the benefits flowing so abundantly to Christiana shareholders, but only flowing to DuPont shareholders in terms of 4 cents and getting Christiana off their back. The asserted Moral Issues are, on balance, against their merger. In the first section of this Brief, I made my argument as to the monetary value of making marketable, for Christiana shareholders, the DuPont shares which Christiana owns. This benefit does not come without a compensating disadvantage for all other DuPont shareholders, a vast and virtually uncontrolled increase in the supply of marketable stock. This is an assault on the law of supply and demand. There is a counter moral issue—what is being done to protect the price of DuPont shares by those who control its fate? Absolutely nothing. There are no tangibly worthwhile increase in earnings per share to provide an obvious economic counterweight in financial analysis and possible dividend increases. There are no restrictions on entry into the market beyond temporary oral assurances as to temporary thinking of some people.

It is unfair, unreasonable and overreaching of Christiana and its shareholders dominating DuPont, and holding its chief executives in chancery to abuse the statutory power they have to accomplish a merger as presently proposed for their own great benefit but to the detriment of the DuPont shareholders other than Christiana.

Respectfully submitted,

/s/ Lewis C. Murtaugh,
Trustee as aforesaid

BRIEF OF CHRISTIANA SECURITIES COMPANY,
pp. 28-32

equally clear, however, that Kidder, Peabody's study of precedents did not foreclose it from recommending a range of ratios within the realm of reasonableness which could be sustained on the basis of that firm's broad experience and expertise in the investment banking field.

2. Consideration of Alternatives.

Each of the financial advisers—and the special negotiating committees as well—inquired as to whether Christiana had any alternative means of achieving the benefits that would flow to it and its stockholders from the proposed merger (Tr. 47-50, 328-329, 497). The reason for this inquiry was not to determine whether the merger should be consummated nor was it designed to ascertain the definitive terms upon which any merger might be appropriate. Obviously, a merger was immediately available to Christiana if it could be negotiated on fair and reasonable terms. Therefore, the concern whether alternatives existed merely represented an attempt to determine whether some limits would have to be placed on the size of any discount from net asset value Christiana might be asked to relinquish in the merger (Tr. 49-50, 313, 487). In other words, if a reasonably available alternative to merger existed which could be consummated at a cost to Christiana that would result in no discount from net asset value, it would then be difficult for Christiana or Du Pont to justify a merger embodying any such discount. Similarly, if the cost to Christiana of implementing an alternative amounted to, for example, a 1% discount from Christiana's net asset value, it would be difficult to justify any larger discount in the merger exchange ratio. However, even if there were no alternatives available to Christiana

other than merger with Du Pont as a means of achieving the advantages of this transaction, Du Pont realized that it would not be free to extort an exorbitant price from Christiana that might amount to overreaching on its part. And indeed, as a practical matter, since Christiana was under no compulsion to merge with Du Pont and could well have remained as an investment company for the indefinite future (as it had for almost 60 years), Du Pont recognized that any merger terms would have to be fair and reasonable to both parties and could not reflect any attempt to obtain an unreasonable financial benefit from Christiana for effecting a transaction which was mutually beneficial to both companies apart from any discount (Tr. 714, 770).

It was in this context that the financial advisers considered possible alternatives to the proposed merger.

(a) *Section 333 Liquidation*—At one point early in the negotiations, it was suggested that Christiana might be able to liquidate under Section 333 of the Internal Revenue Code. While it appeared at first that a liquidation under Section 333 could be consummated with a federal tax cost to Christiana's stockholders of between $38 million and $70 million, subsequent analyses of Christiana's "earnings and profits" and "stock or securities acquired after December 31, 1953" which control the potential tax liability showed nothing more than tremendous uncertainty as to what the tax liability might be (Tr. 49-51, 288-289). This was not simply a matter of mathematical calculation. The definition of "earnings and profits" subject to taxation is far from clear in the tax laws and the Internal Revenue Service will not give advance rulings in this area.[14] Christiana's tax picture was further clouded by various distributions of General Motors common stock re-

14. *Rev. Proc. 72-9*, I. R. B. 1972-1, p. 28, Section 3.017.

sulting from the antitrust divestiture decree entered against Du Pont and by the Delaware Realty merger. Thus, in soliciting stockholder approval of a Section 333 liquidation, Christiana could not explain to them what the tax consequences might be.[15] In those circumstances, stockholders would in effect be voting tax litigation for themselves were they to sanction a liquidation under Section 333.

The absence of Section 333 as a presently existing viable alternative for Christiana did have some impact on the negotiations and on the recommendations of the financial advisers, at least in the case of Morgan Stanley and Kidder, Peabody (Tr. 49, 498-499). Although First Boston was interested to hear of the elimination of Section 333 as an alternative, it did not alter its recommendations when the "death" of Section 333 was formally announced

15. The computation of Christiana's "earnings and profits" is complicated by a number of factors:

(a) the fair market value of the General Motors stock received by Christiana pursuant to the antitrust divestiture decree against Du Pont is the subject of a tax refund suit by Christiana against the United States Government and is thus presently indeterminable;

(b) the effect of pro rata distributions by Christiana of General Motors stock to its own stockholders is uncertain under the tax laws; and

(c) the effect of distributions by Christiana of General Motors and Hercules Powder Company stock in exchange for Christiana's own stock is uncertain under the tax laws (*Compare* Rev. Rul. 70-531, 1970-2 C. B. 76; *William D. P. Jarvis*, 43 B. T. A. 439 (1941), *Nonacq. this issue*, 1970-2 C. B. xxii, *aff'd*, 123 F. 2d 742 (4th Cir. 1942); *Herbert Enoch*, 57 T. C. 781 (1972)).

The determination of Christiana's "stock or securities acquired after December 31, 1953", which is the other factor which determines how much gain is recognized in a § 333 liquidation, is complicated because it is not clear whether the Du Pont stock received by Christiana in its merger with Delaware Realty can be regarded as stock acquired before January 1, 1954.

to all three advisers after June 30 (Tr. 313).[16] Morgan Stanley, upon learning of the elimination of Section 333, increased the range of its recommended discount from a maximum of 2% to 2.5% (Tr. 50). As Kidder, Peabody's representative testified, the elimination of Section 333 required Kidder, Peabody to determine what range of variation around net asset value, considering the other factors in the transaction, would be fair and reasonable. Recognizing that "finance is not an exact science," Kidder, Peabody concluded that an appropriate range would be from a premium of 2% to a discount of 3% (Tr. 499-50).

The elimination of Section 333 may have enhanced Du Pont's bargaining position by removing this potential "floor" on any discount from net asset value (Tr. 715-716). At the same time, the Du Pont negotiators sensibly recognized that they could not force Christiana to accept an unreasonably large discount that might reflect overreaching on the part of Du Pont (Tr. 716).

16. On June 30, 1972 each of the three advisers made a written and oral presentation to the special committees of both Christiana and Du Pont, indicating their preliminary recommendations. At that time, Section 333 was still considered a possible alternative to Christiana and thus provided a potential "floor" on any discount of between $38 million and $70 million—or about 1.7% to 3% of Christiana's net asset value.

Administrative Proceeding
File No. 3-3928

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
MARCH 19, 1973

IN THE MATTER OF
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware
(812-3224)
Investment Company Act of 1940

APPLICANTS' JOINT PROPOSED FINDINGS AND CONCLUSIONS

Daniel M. Gribbon
Cyril V. Smith, Jr.
Peter B. Archie

Covington & Burling
888 Sixteenth Street, N. W.
Washington, D. C. 20006

Counsel to E. I. du Pont de Nemours and Company

Kenneth W. Gemmill
Matthew J. Broderick
Stephen R. Miller
Richard S. Seltzer

Dechert Price & Rhoads
1600 Three Penn Center
Philadelphia, Pennsylvania
19102

Counsel to Christiana Securities Company

—6—

. . . . Six directors of Du Pont also are directors of Wilmington Trust Co., three of whom also are directors of Christiana.

Christiana Ex. 4 Grimes, Tr. 643-58
Du Pont Ex. 5 (pp. 1-2)

11. Du Pont Common Stock and the Du Pont $4.50 Preferred Stock are listed on the New York Stock Exchange. Christiana common stock and 7% cumulative non-voting preferred stock are traded in the over-the-counter market. The reported range of market prices for Du Pont Common Stock for the period January 1, 1970 through September 30, 1972 are set forth below:

	Du Pont Common Stock	
1970:	*High*	*Low*
1st Quarter	$108.75	$ 92.50
2nd Quarter	121.50	97.13
3rd Quarter	128.00	111.00
4th Quarter	134.25	114.00
1971:		
1st Quarter	148.00	129.50
2nd Quarter	152.00	134.75
3rd Quarter	158.00	139.50
4th Quarter	157.25	133.38
1972:		
1st Quarter	175.50	144.25
2nd Quarter	176.50	159.13
3rd Quarter	184.38	160.00
Closing Prices:		
April 28, 1972 (a)	168.25	
July 17, 1972 (b)	164.50	

(a) Announcement was made on this date, after the close of trading on the New York Stock Exchange, that merger discussions would be undertaken.

(b) On this date, the proposed merger was approved in principle by the Boards of Directors of Du Pont and Christiana and the merger terms were publicly announced after the close of trading on the New Stock Exchange.

—7—

The reported bid and asked prices for Christiana common stock and preferred stock for the period January 1, 1970 through September 30, 1972 are set forth below:

	Common Stock				Preferred Stock			
	Bid		Asked		Bid		Asked	
	High	Low	High	Low	High	Low	High	Low
1970:								
1st Quarter	$ 99.00	$ 85.00	$103.00	$ 88.00	$ 99.00	$ 94.00	$103.00	$ 97.00
2nd Quarter	107.00	90.00	109.00	93.00	99.00	88.00	104.00	91.00
3rd Quarter	112.00	100.00	115.00	103.00	96.00	88.00	100.00	91.00
4th Quarter	113.00	101.00	117.00	104.00	99.00	95.00	102.00	98.00
1971:								
1st Quarter	129.50	112.00	131.00	114.00	106.00	97.00	109.00	100.00
2nd Quarter	129.00	120.00	138.00	123.00	106.00	95.00	110.00	99.00
3rd Quarter	141.50	122.50	143.50	124.50	100.00	94.00	105.00	100.00
4th Quarter	136.00	116.00	138.00	118.00	100.00	97.00	104.00	102.00
1972:								
1st Quarter	142.00	120.00	145.00	123.00	99.00	98.00	104.00	101.25
2nd Quarter	166.50	140.00	173.00	143.00	102.00	97.00	106.00	102.00
3rd Quarter	195.50	160.00	205.50	165.50	106.00	100.00	none	none
Closing bid price								
April 28 (a) ..	147.00				100.00			
July 17 (b) ...	167.50				100.00			

(a) Announcement was made on this date, after the close of trading on the New York Stock Exchange, that merger discussions would be undertaken.

(b) On this date, the proposed merger was approved in principle by the Boards of Directors of Du Pont and Christiana and the merger terms were publicly announced after the close of trading on the New York Stock Exchange.

Du Pont Ex. 5 (p. 10)

12. Christiana common stock has traditionally traded at a discount compared to its underlying net asset value. Such discount is attributable principally to potential taxes on unrealized capital gains and to the intercorporate dividend tax. Over the two years preceding April 28, 1972, the date on which merger negotiations were announced, the discount was generally in the range of 20% to 25%, and was 23% on that date. In earlier years the discount frequently had been in the range of 15% to 20%.

Du Pont Ex. 5 (p. 4) Harter, Tr. 548
Joint Ex. 1 (ex. 9) C. Townsend, Tr. 210-11

— 15 —

24. The following tabulation sets forth certain actual and pro forma (after giving effect to the merger, based on the proposed merger terms) data for Du Pont and Christiana for the periods and dates indicated, to illustrate the effects of the merger on per share net earnings, dividends and market value.

	Six Months Ended June 30, 1972	*Year Ended December 31, 1971*
DU PONT COMMON STOCK		
Net earnings per share:		
Actual	$ 4.39	$ 7.33
Pro forma	4.41	7.37
Dividends per share:		
Actual	$ 2.50	$ 5.00
CHRISTIANA PREFERRED STOCK		
Dividends per share:		
Actual	$ 3.50	$ 7.00
Pro forma	1.83	3.66
Market value per share at end of period:		
Actual	$100.00	$100.00
Pro forma	120.00	120.00
CHRISTIANA COMMON STOCK		
Net earnings per share:		
Actual	$ 2.64	$ 5.28
Actual, adjusted to equity method of accounting (a)	4.66	7.76
Pro forma	4.95	8.28
Dividends per share:		
Actual	$ 2.50	$ 5.25
Pro forma	2.81	5.62
	April 28, 1972 (c)	*July 17 1972* (d)
Market Value Per Share: (b)		
Market value of 1.123 shares of Du Pont common stock to be exchanged for each share of Christiana common stock	$188.94	$184.73
Market value of a share of Christiana common stock	147.00	167.50
Increase in market value:		
Amount	$ 41.94	$ 17.93
Percent	28.5%	10.3%

[See following page for footnotes.]

— 16 —

(a) Christiana's actual net earnings adjusted to include equity in the undistributed earnings of Du Pont and The News-Journal Company.

(b) Based on closing market price for Du Pont Common Stock on the New York Stock Exchange and closing bid price for the Christiana common stock in the over-the-counter market on the respective dates.

(c) Announcement was made on this date, after the close of trading on the New York Stock Exchange, that merger discussions would be undertaken.

(d) On this date, the proposed merger was approved in principle by the Boards of Directors of Du Pont and Christiana and the merger terms were publicly announced after the close of trading on the New York Stock Exchange.

Du Pont Ex. 5 (p. 9).

UNITED STATES OF AMERICA

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

—

Administrative Proceeding
File No. 3-3928

—

CHRISTIANA SECURITIES COMPANY
E. I. DuPONT DE NEMOURS AND COMPANY
Wilmington, Delaware

(812-3224)

Investment Company Act of 1940

—

SUPPLEMENTAL PETITION OF LEWIS C. MURTAUGH, TRUSTEE FOR EMANUEL AND HELEN STEIB UNDER DECLARATION OF TRUST DATED 8/30/56 FOR REHEARING INCLUDING A MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE.

LEWIS C. MURTAUGH, Trustee for Emanuel and Helen Steib under Declaration of Trust Dated 8/30/56, files this Supplemental Petition and Motion pursuant to Rule 21 (d) and (e) and as grounds therefor, sets forth the following:

1. The decision ignores the criteria for weighing a transaction in which one group controls both sides of the transaction and gets advantages in a "consensual" setting which is tremendously more to its advantage than the subservient party to the transaction obtains. The criteria for weighing a merger are well settled in law where both sides are under common control. This calls for an arm's length bargaining, or at least a resultant transaction that can be

reasonably construed as a result which would be produced by arm's length bargaining. This is so well established in law that it does not seem possible that such transaction could be validated as fair and reasonable and not overreaching because of the 1940 Act. If the Commission in its interpretation of the Act finds that the standards as it interprets them under the Investment Company Act of 1940 will prevent the kind of agreement that can be fairly said to result in an arm's length bargaining outcome, then so be it. This should be equivalent to saying there can be no merger. This does not leave Christiana in an impossible position for it can, if it wishes, liquidate and, of course, it can market its DuPont, or it can maintain the status quo. (Incidentally, controlled DuPont has no options at all except the "protection" afforded by the Investment Company Act of 1940 and its resort to chancery through a derivative suit). An arm's length result is the kind of a result that a willing buyer who doesn't need to sell and a willing seller who doesn't need to buy will agree upon. This is certainly true in the purchase of asset cases from controlling shareholders, and there is no reason why the same standards should not be applicable in judging this consensual transaction.

2. Were Christiana to go to DuPont and offer DuPont one Christiana share for every 1.15 DuPont shares and through its control seek to have the transaction put through, there seems little doubt that there would be equitable relief given. The Opinion is giving support to the question begging statement that a share of Christiana is essentially the same as a share of 1.15 shares of DuPont would hardly approve the purchase of Christiana shares for 1.15 shares of DuPont absent a merger, when DuPont could go into the market and purchase Christiana shares at ⅞ of the price of a share of DuPont, procuring the money

say, by selling DuPont shares in the market, or, of course, using DuPont's own present resources. Suppose Christiana should force DuPont to budget a certain amount a year and buy Christiana shares, say on a lottery basis, to avoid insider favoring, for an amount equal to Christiana net asset value. This would hardly survive.

3. The fact that the fashioners of Delaware law of whom DuPont is certainly a motivator has lessened stockholders significance until it almost represents true insignificance, should not persuade the Commission that it should roll with the punch. Since the *Delaware Realty* decision in 1961 Delaware has, among other things, reduced the requirement for approval from ⅔ to 50% and eliminated the rights of dissenters to obtain a valuation of their shares. Your objector appreciates the Cary citations, and the text in Footnote 40, but respectfully submits that eliminating an arms-length transaction standard or result is a backward rather than a forward step, and is not consonant with the spirit of the Cary approach.

4. The important transfer of the control aspect is treated tangentially on Page 15. The 1940 Act was not intended to foster the acquisition of control by managerial groups. This is what is happening now and it deserved more of a focus. See Murtaugh brief beginning on Page 55. The fact that it is not DuPont's assets that are being invaded to get the market price of relatively few shares traded in round lots for the thirteen and one half million shares of Christiana, thus possibly hurting DuPont's operations and consequently its share prices, but rather that it is DuPont's share values that will bear the brunt by reason of the way this transaction is structured is economically immaterial. DuPont's shareholders will pay the price of Christiana's transfer of control to management either way.

5. If DuPont and Christiana bargained for a cash purchase by DuPont of Christiana's DuPont shares, would the Commission feel compelled to insist that the sale must be at market value? Suppose the parties agreed to a 10% discount? Would the Commission feel that this violated the spirit of the 1940 Act being, in effect, selling Christiana shares at a discount? Piercing the corporate veil to rationalize a tremendous advantage for insiders with a controlling influence in the transfer of their controlling shares is certainly not the typical equitable circumstance in which courts disregard separate corporate entities.

6. It is commonplace in a commercial transaction that the mere agreement on a price is only the beginning of bargaining and that an entire transaction as it is fully implemented may greatly enhance the worth of the transaction to one side or the other. For example, if a person agrees to sell a portion of a land holding with certain buildings thereon, an important consideration might be that the equipment in the building will be considered real estate or in any event be included in the deal. It may turn out that the seller wants to retain an easement for convenient access or wants to maintain some element of control over the development of the land to be sold such as the character of the improvement or their location with reference to the land his is retaining. Or, for example, if parties are negotiating over employment and fix an agreeable salary before deciding on work schedules, work location, scope of activities and responsibilities, the deal has hardly begun with the salary matter settled. This is especially applicable to the DuPont-Christiana merger. After a raw price of 1.123 shares of DuPont for each share of Christiana agreed upon, the parties still did not develop to any extent the matter of registration rights or the terms by which DuPont would protect itself so that it could live

within the rules of the Securities and Exchange Commission relating to insider sales and within the economic laws of supply and demand in connection with sales facilitated by registration requirements. In fact, the agreement was no where near in final form when the Application was filed and its terms were adjusted dozens of times before the agreement to merge was signed in December of 1972, and as of January 3, 1975 at a conference between all parties and the judge in the derivative suit, we were advised that the agreement still wasn't final and signed. It would seem the carefully crafted document is waiting for the final crafting concession and the hope is that it will ride the coat tails of this decision.

7. Although it may be true that such an agreement need not under Delaware Law be passed upon by the shareholders, it seems clear that this agreement, insofar as it dealt with registration rights, is the kind of an agreement that is prohibited under Section 17(d) of the Act, unless an exemption is granted. To make this even more clear, suppose Christiana was not proposing to merge but just proposing to make DuPont enter into a contract to register indefinitely in the future its DuPont shares in accordance with the terms of the registration agreement. Surely DuPont shareholders would have a right to object to the market damaging circumstances which the unlimited access to the market would provide for Christiana especially if there was little or no consideration given for this. In the Registration Agreement, DuPont surrenders for an indefinite period in the future its right to have any control over non-underwritten secondaries twice a year and underwritten secondaries in excess of 25 million dollars once a year.° Furthermore, it agrees to hold the sellers harmless

° A commitment into the future was barred by the Commission in the 1940 Act case *The Variable Annuity Life Insurance Company of America (1960) 39 SEC 680, 692, 3.*

from any violations of the Securities Laws and the regulations which may be asserted. It is thus unable to protect the market for DuPont shares when, in its opinion, it would be disadvantageous to have additional shares issued, and it further subjects DuPont to continuous liability or claims of liability arising out of the ever-spreading field of liability involving registration. While DuPont may have some rights of exoneration if registration defects are caused by the sellers, this will not protect it originally nor insure recoupment. Incidentally, the opinion seems in error when it states that the registration is to be at the sellers' expense. DuPont is to supply its employees and its facilities without any recompense. I have preferred to state it that the registration is at DuPont's expense except for out-of-pocket disbursements.

8. In footnote 72 of the Opinion there is a reference to Section 17d of the Act and it is stated that no issue has been raised with respect to it but that the standards of this section have been satisfied. Naturally, it is believed that the entire Murtaugh brief raised substantial points on all aspects of this transaction and while the Registration Agreement may not have been attacked specifically by designating Section 17d and the rules thereunder, the references in the Murtaugh brief to the Registration Agreement and the great privileges it confers clearly raised the issues in Sections 17d and Rule 17d-1(a) and (d). Your objector is willing to acknowledge that prior to this encounter he had no experience with the Commission or the statutes or rules under which it operates. If the issue is not deemed clearly raised by the Objectors, we would like to raise them here to qualify it as one of the issues which might be raised on appeal. The material in Murtaugh's brief at Pages 45, 46 and 51 seem fairly to raise a Section 17d issue in particular but the spirit of the rest of the brief

and of the original Murtaugh's letters to the Commission attached to the Application For Leave To Intervene certainly raise the issue of Section 17d as did Amendment No. 6 to the Application for Exemption.

9. It now seems apparent that part of the difficult and troublesome aspects of this case arise precisely because the Registration Agreement is not before the Commission under Section 17d and the parts of Rule 17d-1 which are applicable. It is the firm opinion of Murtaugh that it would be far better for DuPont shareholders to have a merger at no discount from net asset value and with no provision for registration. This would be consistent with the interpretation the Commission puts upon the Investment Company Act of 1940 when it extends other sections of the Act which prohibit the issuance of shares for less than net asset value to make-weight a "spirit" to govern the result here. It should also be pointed out that in the event of a merger with no registration rights granted and with no discount, Christiana shareholders would receive all of the benefits that they could have with a liquidation that was without any tax consequences. Thus Christiana is not being forced into a shareholder taxable liquidation if it will forget about forced registration rights.

10. It should be stressed that the Registration Agreement comes before the Commission only by reason of a last minute insertion in the evidence of the unfinished draft in the case by Murtaugh Exhibit 15 and cannot be considered to have been presented for the judgment of the Commission on its merits, nor was the hearing complete with respect to this nor was it even marginally an issue. This is even more obvious since it was incomplete and still is. This is probably the reason that the Commission feels rather helpless in devising suitable conditions, and taxes the Objectors with not coming up with specific proposals.

Nevertheless, Murtaugh in oral argument did come up with at least one specific proposal based upon the only evidence as to market impact offered by the Applicants which was that up to a total of 10% of DuPont's shares namely 4,700,000 shares could be marketed by secondaries over a period of five years with only temporary effects. Presumably this is as far as the professional witnesses were willing to go. Still its better than nothing. The Commission, however, is willing to go all the way which, of course, is protested and objected to. We may have taken an important step to resolving the market impact issue if attention is focused on the fairness and scope of the registration rights, as well as on the need for them at all. There is less reason to assume that DuPont will not be cooperative in registrations for these influential shareholders if this is not harmful to DuPont and its shareholders generally than there is to assume that DuPont can depend upon the interest in DuPont and its shareholders generally of the new DuPont shareholders who have ironclad rights to register carved out for them by the Registration Agreement regardless of DuPont or its other shareholders interest. As stated previously this is the situation Christiana shareholders would be in if they could have a tax free liquidation, one of the daisy paths down which the financial advisors were lead to keep them from factoring in the market value of Christiana in determining the fair ratio of exchange. (The other daisy path was the assurance of virtually no selling.)

11. The fact that DuPont management agrees to Christiana's suggestion of a merger is of little significance, once it is fully understood that the holders of Christiana control the Finance Committee and the Nominating Committee for the directors of DuPont, and the way to promotion and pay for all those not retired, and to positions

well compensated on committees of directors for those who are retired makes for a situation where DuPont interests are forcibly identified with Christiana's. Out of 26 directors of DuPont only two were newcomers who might be classified as outside directors, who might have performed a significant function as members of a negotiating committee, but were barely kept informed, if that.

12. Certainly the quoted language of the Section 1 of the 1940 Act refers to the dominant persons in this DuPont-Christiana setup. There is no possibility that the dominant persons in Christiana are likely to do something to favor DuPont as against the interest of Christiana shareholders. To convert the Act into an additional shield for Christiana's use of its controlling interests is to pervert the Act. It would be far better for DuPont if the Act had never been passed.

13. The Commission construes the Act as leaving it no alternative under the circumstances. As stated above this is an abrogation of the concept of an arm's length dealing, or a result equivalent thereto, as the opinion recognizes. This is especially obnoxious in transfer of control situations where one side is greatly enriched and both sides are governed by one side. The market impact matter, more or less conceded in the Opinion, or at least demurred to, even if not pertinent to Rip Van Winkle type investors will certainly keep short term investors, and even mere tape watchers on nervous alert and keep prudent new long term investors on the side line, and will keep those in the inside peeking to see if the others are truly asleep so that they can diversify into some other long term investment without an overhang. Naturally, there will be an investment appeal when DuPont drops enough but there is no reason to assume that it will rebound equivalently to the drop. Certainly the knowledge of the prob-

ability of more stock being marketed will haunt the market and prevent the recovery so clearly predictable by the Opinion. This was the essence of the divestiture case evidence and in large part the divestiture evidence was the strength of the refund claim (ignored by the Opinion). As estate taxes mount on older generations creating new bases, even the tax deterrent will be gone as its now for the ⅛ of Christiana shares held by charities and the known 5% or so of heirs of decedents who died when the price of both DuPont and Christiana were much higher than present sale prices.

14. The insight which led the Commission to make its ruling in *Fifth Avenue Coach Line, Inc., 43 SEC 635-639* is absent from the present opinion which focuses exclusively on the interest of the security holders in the Investment Company and turns its back on the interest of DuPont shareholders generally. There is much language in the law, in the rulings and in the cases which indicate that there should be alertness to make sure that the laws and regulations are applied with in-depth perception and a studious scrutiny of the acts of controlling people.

15. The statement that in "economic reality Christiana stock already is DuPont stock under another name" begs the question, can only be true if the Commission and the directors disregard truer economic realities. The inherent tax disadvantages to Christiana and its market valuation not to mention the separate legal entities and the fact that economically the vastness of its holdings of DuPont made its investment unrealizable at the market price of a few shares. Furthermore this blockage factor will cease to be academic when the holders of huge blocks of Christiana come to market to diversify their holdings. Many holders of Christiana hold in excess of 100,000

shares and many more hold shares in five figures. To equate the value of the shares of a person holding 100,000 shares of DuPont with the value per share of a holder of 100 shares is utterly unrealistic.

16. The discernment which particularizes on the income tax burden on high bracket Christiana shareholders who will be able to get 7.27% of taxable income is misplaced. In this day of tax shelters it is notorious that many high income people pay very little taxes. However, the advantage of receiving taxable income should stand on its own two feet without deprecation because of income taxability. Damages for loss of income would not be less because taxable.

17. It is interesting that the only authority cited in the entire opinion on the arms-length bargaining concept is *Atlas Corporation 37 SEC 72 85-86 (1956).* Naturally a close reading of that opinion is in order. This was a merger of many companies, the shares of which were held in various proportions by the holding company. The value of the properties of the portfolio company in question, Albuquerque, defied clear analysis since it involved estimated future net cash realization from oil and gas reserves. There was also much consideration of capital gain taxes which might be avoided if a liquidation alternative was adopted though this would involve a capital gain tax on the shareholders and "appropriate weight" was given to several tax factors. The net asset values were weighted by reason of the tax factors and the fact that Albuquerque would have a much broader and more active market than the shares they presently held and would receive dividends, not presently being paid on Albuquerque, was weighted into the picture. Out of all this, an apparent 4% discount from net asset value was approved. We would

be glad to use most of the concepts resorted to by the Commission in weighing the Albuquerque-Atlas merger. It certainly shows no single-eyed concern for net asset value. Overall it gives more support to the objectors' position than it does to the applicant and it finds a fair result from numerous factors which quite reasonably would have been the result of arms length bargaining. If this is the only decision (or language) that the Commission can point to, we are indeed breaking new ground here.

18. To downgrade the threat to DuPont's share prices as the Opinion offhandedly does by its casual reference to Wilmington Trust Company sales is to escape reality. Failing to take more fully into account the positive need for Wilmington Trust Company to diversify a billion dollars worth of new DuPont shares is to trivialize the role of Hamlet. *Furthermore, it goes right to the fairness issue.* We have much information discovered and more in process of discovery to give dimension to this. This was an important matter in connection with fixing the ratio. Edward Townsend of First Boston Corporation testified that if there were going to be substantial sales that would have to be taken into account in fixing a ratio and he recognized this might kill the merger,[1] and even Charles Townsend of Morgan Stanley agreed it would be an important factor [2] but kept insisting that there would be no substantial sales. Kidder Peabody's opinion was qualified by the assumption there would be no sales.[3] There is an eco-

1. Tr. 402.
2. Tr. 191.
3. Exhibit 2 to the Kidder Peabody report states:
   "Our report is based, among other things, upon the following assumptions:
   . . .
   (xi) That there will not be a registration and subsequent sale of DuPont stock received in the merger by major Christiana Shareholders."

nomic limit on the amount of DuPont securities which can be marketed in the single secondary. This is far less than Wilmington Trust Company would bring to market were it not for this factor. This means for Wilmington's needs alone that there will have to be several secondaries and this overhang will exert continuous depressing effects on the market. Both Emerson of Morgan Stanley (Murtaugh's brief, Page 21) and Lenz of Merrill Lynch (Murtaugh's brief) testified that there would be a continuous 10% to 15% decrease in the price of General Motors' shares simply by reason of the sale by a trustee of .7% a year of General Motors shares which would be offered over a ten year period and this was even though the trustee was given some leeway to avoid unfavorable timing. This testimony was given in answer to an inquiry as to what would be the result if Congress passed a bill to make the distribution of General Motors shares completely tax free. The opinion of Judge LaBuy 177 F. Supp. 1, 31 states the following:

> "Lenz also gave his opinion as to the effect of the Government plan in case a bill such as S. 200 passed and the du Pont Company made one distribution of the 63,000,000 shares of General Motors, but where the trustee still sold shares going to Christiana and Delaware in ten equal annual installments. He estimated a 10% to 15% decrease in market price."

Instead of 7% spread over a period of ten years here Wilmington alone is getting over 15% of DuPont at one time. Anyone who thinks Wilmington will not be far below 8% in less than 10 years is certainly unworldly.

19. The distinction between "market value" and "fair market value" which is made in the opinion is tendentious. It apparently is on the basis of this that the Commission

ignores the refund suit wherein Christiana claimed that it was entitled, in fairness, to a substantial discount from the quoted market price of General Motors shares distributed to it (2½%—1962, 1⅔%—1964, 2½%—1965). Christiana is getting over 28% here in one year and controlling both sides of the transaction insisting upon getting the quoted market price of traded round lot shares. Fairness was the issue in the refund suit. Unfairness to holders of General Motors and DuPont shares was the issue in the divestiture proceeding before Judge LaBuy. "Fairness," is a soluble word introduced into the act in Section 17. The fact that Congress omitted the word fair in another section to prevent dilution of existing Investment Company shareholders' proportionate interest in assets and restricted sales to the total market price of its portfolio assets is in no way controlling or even persuasive in the general concept of a fair transaction under Section 17. This would be evident were Christiana merging say with American Telephone or General Electric. At the conclusion of the hearing I made the point that I had only been given in connection with the refund suit the opinions of Morgan Stanley and Merrill Lynch in exhibits in the case. I also asserted my belief that further investigation would yield much more information in support of the claim that Christiana was making. This has proven to be the fact. Much information has been developed by discovery in the derivative suit as to assertions by Christiana on the question of the fairness of its being taxed on the basis of the quoted market price of round lot trading multiplied by the number of shares it received. Great emphasis was laid in the refund suit upon the fairness issues in the divestiture case which, of course, was not related to "fair market value" but unfairness because of market impact. This information relates to fairness which is the name of the game we are playing here.

This evidence, of course, would be introduced on a rehearing. It is respectfully protested that the constant presentations of DuPont and Christiana as to what is fair in the derivative suit and what is fair in the refund suit should have a bearing on the Opinion of the Commission on the issues in this case. It is not very complimentary to assume their contentions and evidence were not sound (not true?) and shouldn't be held against them, while the point of view they vigorously fought is sound after all (and so rewarding).

20. The Opinion exhibits a special interest in the relatively few people, in terms of shareholdings, who have invested in Christiana over the years with a full knowledge of its characteristics and the discount from the net asset value of its DuPont shares, though it yielded to a purchaser a distributable dividend after taxes which is about 7½% more than a purchaser of DuPont would receive, though DuPont sold 13% higher per share. It is an unfair approach to this matter to consider the market value of Christiana only as against the market value of 1.15 shares of DuPont. The average purchaser of Christiana, say just prior to the merger talk, could see that DuPont was selling at $168 and Christiana with 1.15 shares of DuPont was only selling at $146, and he would undoubtedly reason that Christiana was good as long as DuPont was good and that instead of DuPont's $5 dividend on a $168 investment, he could get $5.38 in dividends on Christiana for $22 less in raw market price for a share of Christiana vs. DuPont. There would always be a higher yield on Christiana as long as it maintained its declared policy of paying out on all its DuPont dividend minus 7.2% tax burden and it suf-

° Edward Townsend of First Boston Corporation was quite emphatic that Christiana's market price was its full value intrinsically and its net asset value was not an index of its true value (Tr. 383) and that it was not underpriced. (Tr. 404)

fered only a .3% operating expense. The largesse of the increase in the principal value of his holdings, about 33%, may have been part of the larger scheme of the DuPont family as it zealously propagated its posture of non-control of DuPont, but it hardly was in the minds of most of the ordinary investors of Christiana. If so, they undoubtedly would have bid up the price over what seemed to be a typical ratio of the prices of closed-end investment companies and to the net asset value of their holdings.

21. The assumption that some of the 338 large holders of Christiana may be wholly unconnected with the founding family or its collaborators at its birth is nowhere supported in the record. If it is significant, it should be there. If not, it should be deleted. It unfairly tends to add dimension to the argument discussed in the preceding paragraph. Mr. Justice Brandeis said in *The Chicago Junction Case, 264 U. S. 258, 263,* "Facts conceivably known to the Commission, but not put in evidence, will not support an order. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431.* . . . to make an essential findings without supporting evidence is arbitrary action." The same observation is applicable to the historical material gathered by the writer of the Opinion which is entertainingly written but also is not based on anything in the record and comes from relatively casual sources. I might suggest that the Opinion could be improved in this respect if the data were derived from contexts more familiar to lawyers which are fortunately available. In *U. S. vs DuPont, 177 F. Supp. 1,* a short but rather careful relation of facts may be found beginning at Page 36. A more detailed account of the family controversy is to be found in the case of *DuPont vs. DuPont (3 CCA, 1919) 256 Fed. 129.* Under general principles it would seem that if his-

torical matters are relevant and contribute to the solution of a problem that they should be in the record. I have no objection to deriving material from the record in other contested matters such as above cited. Of course, I very strongly feel that the material in the General Motors divestiture case before Judge LaBuy and in the Supreme Court are important historical matters which are much more relevant than what happened in 1915. Unfortunately, the Opinion turns away from this.

22. The dispersion benefit to DuPont hides the benefit that DuPont shareholders have from having a recourse, through Christiana with common interest to all DuPont shareholders, in the effective operation of DuPont. The Opinion recognizes this as to raiders. It is also a built in protection all DuPont holders now share but will lose. As an instance of what is meant, an article from Business Week of December 21, 1974 is attached. More than that it indicates not just immediate distribution but a wider market for DuPont shares because more will be available for sale. It is pregnant with the happy thought that the more wheat there is produced the more people will eat bread, without the burden of considering that this will be as a result of a lower price. The Opinion's narrow construction of dispersal, seems to be a crutch to support its later doubts or agnosticism about market impact, the latter feeding on the lack of evidence Murtaugh is cut off from producing.

23. The extended Opinion, in mass, unfortunately tends to obscure the difficult and troublesome problem of sanctioning this transaction as a result of anything but a recognition of raw power and dictation, unlike any conceivable arm's length result. Surely some diminution of a Christiana shareholder's bonanza in terms of ratio or conditions would hardly "inflict (sic) a really substantial detri-

ment" on Christiana shareholders. If sensitive but independent DuPont bargainers couldn't sleep nights after getting a somewhat better deal for DuPont, they would be fit subjects for psychiatry. Based on figures at the relevant time in 1972, let us restate the situation.

Christiana Shareholder Gets	*DuPont Shareholder Gets*	*DuPont Management Gets*
$42 in added *available* price.	$1.10 increase in equity per share (80 cents net).	Control •
7.5% increase in dividends.	3 cents increase in share of earnings, minus 28%	• Except it surrenders control of registrations
Liquidity.		
Registration rights.		
¼ free of restrictions.		
Tax free liquidation effect.		
Loses:	Loses:	
Possibility of transferring control.	Management responsibility to shareholders interests underwritten by Christiana's centralized interest in DuPont's operation.	
Voting Control	Effect of Market Impact of added shares.	
	Responsibility of directors to be guided by DuPont's interests from time to time in regard to Registration.	

24. In addition to the types of evidence this Objector would like to have the privilege of introducing on a rehearing, I respectfully request that the record include the following material which is on file with the Commission but should be in the record for convenient reference as to mat-

ters contained therein. If no rehearing is granted, we request, in any event, this material be included:

Notice of Annual Meeting of the DuPont Company dated March 7, 1973

Proxy for above Annual Meeting

Notice of Annual Meeting of Stockholders of Christiana Securities Company dated March 13, 1972

Semi Annual Statement Christiana Securities Company June 30, 1973

SEC Form N-1R filed by Christiana Securities Company for the year ended December 31, 1971

Wilmington Trust Company Annual Report for 1971

Wilmington Trust Company Notice of Annual Meeting of Stockholders dated March 16, 1972

Most of this material has been discovered as a result of the derivative suit. Much more material was discovered as described above and much material was also discovered which is not expressly defined but which it might be determined to be relevant in the event of a rehearing. The matters specified in this paragraph, however, are simply an aid to a court on review and to help them visualize the factual situation and various publicized statements and the interrelationships. If the Commission sees fit to have this material introduced, I will see that copies are sent to all of the parties of record as well as, of course, to the Commission. I do need the accommodation of the Commission or the Applicants in one respect as to filed matter. I would like to have in the record a copy of the Proxy for the DuPont Annual Meeting notice of which is referred to above. The only reason is to show that three directors of Christiana were three out of the four-man proxy committee composed of DuPont directors. I do not seem to have such a copy. I do not know if it would be proper to forward these instruments at this time without permission for a rehearing but if the Commission wishes me to follow this procedure, I shall immediately comply and I request the additional short time needed for this purpose.

Respectfully submitted,

/s/ LEWIS C. MURTAUGH,
Lewis C. Murtaugh, Trustee for
Emanuel and Helen Steib
under Declaration of Trust
Dated 8/30/56

LEWIS C. MURTAUGH
MURTAUGH AND KING
141 W. Jackson Blvd.
Room 2650
Chicago, Illinois 60604
939-2880

[BUSINESS WEEK December 21, 1974 29]

EXECUTIVE SUITE

Who Did the Housecleaning at A&P

Leonard Dalsemer, a retired executive vice-president of International Paper Co., accepted an invitation last year to serve on the board of trustees of a charitable foundation. The foundation was the John A. Hartford Foundation, and last week a series of moves instigated by a committee of trustees headed by Dalsemer culminated in a dramatic management change at The Great Atlantic & Pacific Tea Co. The Hartford Foundation owns 33% of A&P's common stock.

In a board meeting at its new corporate headquarters in suburban Montvale, N. J., A&P directors elected Jonathan L. Scott, vice-chairman of the board and chief executive officer of the huge supermarket chain and designated him to succeed William J. Kane as chairman when Kane takes early retirement on Feb. 1. Scott, 44, the first outsider in A&P's 115-year history to serve as chief executive, had resigned two weeks before as vice-chairman and chief executive officer of Albertson's, Inc., a Boise-based regional supermarket chain with 288 stores whose estimated $1.04-billion in sales this year is small in comparison with the $6.8-billion that A&P should register in 1974 if sales continue at their current rate.

The outsiders. The move to oust Kane, 63, from the top slot at A&P he has held since 1971 was precipitated by changes that took place last year at the Hartford Foundation. There, where the pattern has always been to name trustees who were former executives of A&P, a quiet revolution in foundation policy took place that culminated last

POLICY CHANGES ON THE HARTFORD BOARD RESULTED IN THE OUSTER OF KANE

week in Kane's ouster and Scott's election. A desire by the trustees to get outside advice led to the recruitment of four additional trustees, including Dalsemer, Dr. Perry E. Gresham of Bethany College, Bethany, W. Va.; Oscar L. Dunn, senior vice-president for finance of General Electric Corp.; and Charles Moeller, Jr., senior vice-president for investments of Metropolitan Life Insurance Co. The number of trustees was expanded from 9 to 12 and as Dalsemer puts it, "The majority became a group of men with no connection with A&P."

Meanwhile, pressure was being applied to the trustees from another direction. Michael McIntosh, president of the McIntosh Foundation of West Palm Beach, Fla., filed suit in New York State Supreme Court early this year and introduced as evidence information supplied to his foundation by A&P indicating that three A&P divisions, based in Chicago, Buffalo, and Cleveland, had accumulated losses of $80-million in the four years ending in 1973. The McIntosh Foundation, which owns 1,350,000 shares of A&P common, asked for consolidated financial information on A&P, but was turned down.

"We could still appeal, but with these new developments we won't," says McIntosh, explaining that "we felt strongly that we had to use all the tools we had in our fiduciary capacity as trustees to improve our assets."

It was the matter of the fiduciary responsibility of the board of trustees that apparently precipitated the changes at the Hartford Foundation, too. Leverage was applied on the Hartford trustees by other big A&P stockholders, such as the McIntosh Foundation and Thor Ramsing, president of Trident Oil Corp., who with his wife owns 350,000 shares of A&P common.

Track record. "The record under Kane speaks for itself," says Ramsing. "We reminded the A&P board that its track record was not all that great. When you have five dividends passed and get involved in an antitrust lawsuit, you have evidence of disastrous mistakes." In the antitrust suit, a group of cattle ranchers and feedlot operators charged A&P, Safeway, and Kroger with conspiracy to set meat prices. Kroger and Safeway settled out of court for $45,000 each, but A&P chose to fight, and a district court in San Francisco held the company liable for $32-million in damages this summer.

McIntosh appears to have used the passed dividends as a wedge to raise the question of whether the trustees of the Hartford Foundation were looking after their assets properly. The Hartford trustees saw the light and this spring established a special three-man committee to work with A&P on its problems. Dalsemer was named chairman, and the other committee members were GE's Dunn and Hartford Foundation President Harry George. The trustees also retained the Davis, Polk law firm to advise them on their fiduciary responsibilities.

The upshot of Dalsemer's work was the retention of the management consulting firm of Booz, Allen & Hamilton to study A&P's reorganization. Scott acknowledges that Booz Allen approached him with several "feelers" for the top A&P slot.

The former chief executive of Albertson's says he expects to "replace a lot of physical plant" at A&P, and he thinks the big food retailer "may even grow smaller for a while." Scott says that he would like to see A&P regain its position as the biggest food retailer, lost to Safeway last year, but stresses "this is not my No. 1 goal for a while." The "biggest challenge and opportunity in the industry," as he terms his job, is "getting A&P turned around and growing again."

EXCERPTS FROM TRANSCRIPT OF SEC PROCEEDINGS.

[7]

* * *

Judge Ullman: * * * Does anyone else wish to make an opening statement? Mr. Murtaugh?

Mr. Murtaugh: Lewis Murtaugh. I would like to say on the record that the possibility of conducting consecutive hearings is very nil. And I would want to do justice to my position, the position of du Pont shareholders generally, and I wouldn't want my participation here to be in any way considered to be a waiver of my right to ask for a continuance at this time if consecutive hearings are to be the order of the day. However, I don't anticipate Your Honor's ruling to that effect. We could just continue my motion for a continuance until we see how the hearing comes out.

Judge Ullman: Your participation will not be a waiver of your request.

[11]

* * *

Judge Ullman: I think as Mr. Gribbon suggested, if and when the time comes for a determination with respect to the need for continuing the hearing——

Mr. Murtaugh: That is not what I was directing myself to.

Judge Ullman: I understand that, sir. But I think that related to that question will be certain questions which you have raised in your motion.

Mr. Murtaugh: Thank you very much, sir.

Mr. Anderson: Your Honor, the Division does not have an opening statement. However, we would like to note that as you mentioned, the Commission issued an order—excuse me, a notice of filing on October 3. In response to that notice of filing the Division received letters from 19 different people, sometimes as many as ten different letters.

I have given the applicants the originals of those letters, in some cases copies, because that is what was received by the Division. And the Division would like to see these put into the record not for the truth of the matter therein asserted but for the fact that the Division did receive them——

• • •

[13]

Mr. Gribbon: Your Honor, with Mr. Broderick's approval I will conduct the principal examination of Mr. Townsend on behalf of both of the applicants, although I believe he would like to reserve the opportunity perhaps to supplement what I say. We will try not to duplicate.

Judge Ullman: Very well, sir.

DIRECT EXAMINATION.

By Mr. Gribbon:

Q. Would you please state your name?

A. Charles C. Townsend, Jr.

Q. And what is your occupation?

A. My occupation is investment banker. I am a partner of Morgan Stanley & Co., and a managing director of Morgan Stanley & Co., Inc., an affiliated corporation.

Q. What is your particular position with Morgan Stanley?

A. My position at the moment is partner in charge of the corporate financing department at Morgan Stanley. This department has some 70-odd employees of whom 12 are partners, and the business of the department is to prepare materials for public issues of securities, prepare material for providing corporate merger advice, and technical operations of that type.

Q. What is your educational background, sir?

A. I was graduated as a bachelor of science in electrical engineering from Princeton University in 1951, and I was graduated from the Harvard Graduate School of Business

[14]

Administration in 1956.

Q. How long have you been associated with Morgan Stanley?

A. Since early 1959.

Q. How large is Morgan Stanley & Co.?

A. At the moment Morgan Stanley & Co. and its affiliated organizations employ approximately 400 people. These operations range from the investment banking company, Morgan Stanley, to a real estate brokerage operation, Brooks, Harvey & Co., and an affiliated investment banking company, Morgan & Cie International, S. A., which is located in Paris.

Q. Will you describe briefly your experience with Morgan Stanley since you went with the firm in 1959?

A. Yes, sir. Working backward, I have been the head of the corporate finance department at Morgan Stanley since early—no, excuse me, late 1971. Prior to that time and from early 1969 I was a vice chairman and planning director of Morgan & Cie International in Paris, the international investment banking affiliate which I described a moment ago. Prior to that time I was—and from the date

I was employed at Morgan Stanley in early 1959 I worked in the corporate finance department and became a partner in the firm working in that department in 1963. My activities largely in the early years working at Morgan Stanley involved work for the du Pont Company and Christiana Securities

[15]

Company, stemming from work in the divestiture proceeding wherein Sumner Emerson testified in Chicago in 1961.

Q. What do you mean by the divestiture proceeding?

A. This was the anti-trust case of the United States versus du Pont-General Motors.

Q. All right.

A. And my activities at that time were to help Mr. Emerson prepare his testimony for the court proceeding in Chicago, and following that, preparing his testimony before the House Ways and Means Committee and the Senate Finance Committee.

In addition to that, we helped advise du Pont in the disposal of the General Motors shares and assisted Christiana in their disposal of General Motors. Morgan Stanley & Co. performed the role of managing underwriter in the four secondary offerings of General Motors which accompanied the divestiture of General Motors.

Q. Did you advise Christiana in any other matters during this period?

A. Yes, sir.

Q. What were they?

A. During the divestiture proceeding Christiana received three large blocks of General Motors stock and Morgan Stanley advised Christiana; for tax purposes Morgan

[16]

Stanley evaluated those blocks of stock.

Q. Did you advise Christiana with respect to any exchange offerings?

A. Yes, sir, we did. In 1965, early 1965 Christiana offered 8,400,000 shares of General Motors exchanged out to its own shareholders. And of these, 4.4 million were exchanged. Morgan Stanley advised Christiana on what basis of exchange Christiana should offer these shares.

Q. Were there any other exchange offers in which Morgan Stanley offered advice?

A. Yes, sir. In 1967, I believe, Christiana exchanged out 600,000 shares of common stock of Hercules, Inc., again to Christiana's common shareholders and we advised Christiana on what basis of exchange to offer them to the shareholders.

Q. Were you personally involved, Mr. Townsend, in these two exchange offerings that you described?

A. Yes, sir, I was.

Q. Would you tell us briefly the manner in which Morgan Stanley analyzes problems such as exchange offerings that are presented to them with a request for financial advice? Your procedure?

A. Yes.

Morgan Stanley normally—when a project comes into Morgan Stanley such as the projects Mr. Gribbon has described, a team will be put together of people in the

[17]

corporate finance department and marketing departments. This would be a relatively small team of four to six people. The responsibility of this team would be to gather information and to present it in a manner in a memorandum and exhibits that would then be distributed to a larger group

within the firm. I might say that in this case, Mr. Gribbon, the group to whom such a memorandum was distributed amounted to about 18 to 20 people. And these people are senior partners of the firm and experienced associates who have had experience in matters such as this.

The group after they have had a chance to study the information meets maybe several times and discusses the problem and reaches what we consider to be a firm view as to what the answer to the question should be. That procedure was followed in this case.

Q. You have described a number of instances in which the firm has rendered financial service to du Pont and Christiana. Are there any other instances in your recollection where the firm has served either du Pont or Christiana in financial matters?

A. From time to time, sir, the firm has evaluated the market value of blocks of Christiana and du Pont stock for shareholders of those two companies. It has also arranged the private placement of some blocks of these stocks. Fairly recently Morgan & Cie International managed a public

[18]

issue for the du Pont Company in the international market.

Q. Do any of the partners of Morgan Stanley serve on the board of directors of either du Pont or Christiana?

A. No, sir.

Q. Have you ascertained the stockholdings of the Morgan Stanley partners in du Pont and in Christiana?

A. The officers of Morgan Stanley & Co., Inc., which is the group of people we asked to find out what their shareholdings are—the officers of Morgan Stanley & Co., Inc. own I believe 1,189 shares of common stock of the du Pont Company, and they also own 80 shares of the common stock of Christiana Securities Company.

Q. Those figures you have given us are the combined holdings of all of the——

A. Yes, sir, of all the managing directors and vice presidents.

Q. Now, was Morgan Stanley asked to advise as to the terms upon which a merger of du Pont and Christiana might be effected?

A. Yes, sir, it was.

Q. By whom was such a request made?

A. The request was made by the negotiating committees of both companies, sir.

Q. Was the request made in writing?

A. Yes, sir. As I recall, it was made in the form

[19]

of a letter dated June 6, 1972.

Mr. Gribbon: At this time, Your Honor, I ask that there be marked for identification as Applicants' Joint Exhibit No. 3 a communication dated June 6, 1972 from the special committees of the board of directors of du Pont and Christiana to Morgan Stanley & Co., 140 Broadway.

Judge Ullman: Off the record.

(Discussion off the record.)

Judge Ullman: On the record.

Mr. Gribbon: In the pre-hearing submissions made by the parties the documents to be offered in evidence by each party were identified, and du Pont and Christiana, the applicants, identified these documents by number. And this one is in the hands of the parties and already contains the legend on it "Applicants' Joint Exhibit No. 3," and I thought to avoid

confusion it might be well just to stay with that as we go through here.

Judge Ullman: Very well, sir.

(Applicants' Joint Exhibit 3 was marked for identification.)

By Mr. Gribbon:

Q. Would you examine the document that has been marked Applicants' Joint Exhibit No. 3, Mr. Townsend.

A. Yes, sir.

Q. Do you recognize it?

[20]

A. Yes, sir.

Q. What is it?

A. This is the letter from the special committee of the boards of directors of the two companies asking Morgan Stanley to advise the committees with regard to the proposed transaction.

Q. What did you understand to be the nature of the assignment that Morgan Stanley was being asked to take on?

A. The assignment we understood that was to be taken on was to propose to both committees the terms of a merger that would be reasonable and fair and not overreaching.

Q. Were you advised as to why both applicants or both companies came to you jointly for advice?

A. Not specifically, Mr. Gribbon. We were not surprised that the companies had come to us and asked us for their advice.

Q. What do you mean by that?

A. Well, we had experience—if I may say so, we had had experience in the past when the Delaware Realty and

Investment Company was merged into Christiana, and at that time we were advised by both those companies to propose the terms of merger that were reasonable and fair and not overreaching.

Q. Did you understand at the time you undertook this engagement that the transaction would have to be subjected

[21]

to the approval of a governmental agency?

A. Yes, sir, we were aware that the Securities and Exchange Commission would have to review the proposed transaction under the Investment Company Act of 1940 and itself determine that the terms were reasonable and fair and not overreaching.

Q. Had Morgan Stanley previous experience in advising in regard to Section 17 transactions?

A. Yes, sir, in the transaction I just mentioned, the Delaware Realty-Christiana transaction, this transaction was also reviewed by the Securities and Exchange Commission and judged to be reasonable and fair and not overreaching.

Q. Morgan Stanley has advised in other Section 17 transactions to your knowledge?

A. I do not recall them specifically except that I am fairly certain that in both exchange offers wherein Christiana offered General Motors stock and Hercules, Inc. common stock to its own shareholders, these two transactions had to be approved by the Commission.

Q. Did you in developing your analysis in response to this engagement obtain legal advice as to the interpretation that had been placed upon Section 17?

A. Yes, sir, we did. And we also asked counsel to research the record to determine what precedents, if any,

existed that would provide evidence as to how the transaction

[22]

might be structured.

Q. And did counsel assist you in the respect you have described?

A. Our counsel, Davis Polk and Wardwell, together with another legal firm we engaged, Skadden, Arps, Slate, Meagher and Flom, gave us information in this regard, yes, sir.

Q. Were you advised, Mr. Townsend, that other investment firms had been retained to render financial advice with respect to the proposed merger?

A. Yes, sir.

Q. Did you consult with such other firms in the development of your analysis and opinion?

A. No, sir.

Q. Were you asked as part of your engagement to advise du Pont or Christiana as to whether a merger should be undertaken?

A. No, sir. When we were informed that the companies wished to have us propose the terms of merger it is my recollection they had both agreed to study the matter and we were not advised as to whether or not they should merge.

Q. What did you understand to be the advantages and disadvantages of a merger into Christiana?

A. Well, the first, most significant one was the possibility that if a merger was arranged at something near

[23]

net asset value the stockholders of Christiana would have a substantial increase in the market value of their holdings.

The second was an increased liquidity in the market for their securities. First of all, Christiana has a reasonable over-the-counter market. The market for du Pont is substantially more liquid. And Christiana stockholders receiving du Pont stock would have a much more liquid market in which to market their shares.

The third advantage to Christiana in the merger with du Pont would be the elimination of the Federal income taxes and expenses of operation that have been associated with Christiana's operations throughout the past.

As far as the disadvantage is concerned, the principal disadvantage Christiana would face would be whatever benefit might result from its being the largest shareholder in du Pont, owning some 28 percent of the shares.

Q. What did you understand to be the advantages and disadvantages of a merger to du Pont?

A. To du Pont? The principal advantage to du Pont would be the dispersal of this large block of common stock. It would enhance—we believe it would enhance the relative voting rights of du Pont's other common stockholders.

Secondly, if the merger terms were arranged in such a manner that du Pont could acquire Christiana at something less than its net asset value, there would be a

[24]

financial advantage to du Pont.

Thirdly, du Pont in its normal corporate operations, because of its relationship with Christiana, in many cases had to seek exemption under the 1940 Act for commercial transactions. And by merging Christiana out of existence this requirement would also disappear.

A fourth, there might have been in our view a modest increase in the liquidity for du Pont common stock on the exchange by virtue of folding in the volume in Christiana.

Q. You spoke of dispersion of the largest single block as being an advantage in the sense that it would increase the vote of other du Pont shareholders?

A. That is correct, sir.

Q. Did you see any other advantages to du Pont in the dispersion of this large and single block?

A. Well, one could conceive in the future if du Pont had to raise equity capital—the manner in which it would raise equity capital I think is required to be by offering shares to its stockholders. One could see and one could estimate that if Christiana as the 28 percent holder of du Pont had to exercise these rights, it would be difficult, if not impossible, for it. And thus if those rights were thrown on the market it might make a very—it might inhibit, if you will, du Pont's ability to raise common

[25]

stock funds.

Q. Did the existence of this large single block in one voter impose any threat to the market value of the balance of the du Pont shares?

A. No, sir. One cannot say that when the Christiana stockholders receive du Pont following a merger that sales would not result. I think sales would result but we felt that they would be of a nature that would not have a material and lasting effect on the market price for du Pont.

Q. Did Morgan Stanley ultimately render to the representatives of du Pont and Christiana an opinion as to the terms on which merger might be undertaken?

A. Yes, sir. We prepared a letter dated July 7th—a memorandum dated July 7th, together with some exhibits, and a single-page letter in which we commented on the merger exchange ratio as had then been negotiated.

Mr. Gribbon: May I ask, if Your Honor please, that there be marked for identification as Applicants' Joint Exhibit 1-A a 16-page letter from Morgan Stanley & Co. dated July 7, 1972, to Messrs. McCoy and Shapiro, directors of the du Pont Company, and Messrs. Edward du Pont and Felix du Pont, directors of Christiana.

And in conjunction with this I would like to have marked as Applicants' Joint Exhibit 1-B a set of 14 exhibits that accompanied that opinion that are found to carry the

[26]

date June 30, 1972. And as Applicants' Joint Exhibit 1-C, a one-page letter from Morgan Stanley dated July 7, 1972, again to Messrs. McCoy and Shapiro and Messrs. Edward du Pont and A. Felix du Pont.

Judge Ullman: Yes.

(Applicants' Joint Exhibits 1-A through 1-C were marked for identification.)

Mr. Gribbon: I might explain, Your Honor, that these three exhibits that I have asked to be identified as Joint Exhibits 1-A, B and C, are part of the application—physically part of the application which had been identified in our prehearing submission as Joint Applicants' Exhibit 1. In view of Your Honor's ruling with respect to that application, it seemed to me desirable to have these documents, and there will be some others from the application introduced in evidence.

Judge Ullman: Very well.

By Mr. Gribbon:

Q. Will you examine Applicants' Exhibits 1-A, B and C, Mr. Townsend?

Mr. Gribbon: If Your Honor wants to look at those I think Mr. Townsend has an extra set of these three documents.

Judge Ullman: Yes, sir. He is using his extra set, sir.

[27]

By Mr. Gribbon:

Q. Did you participate, Mr. Townsend, in the preparation of these three documents?

A. Yes, sir. I was in charge of the team that prepared the information for the firm to consider, and ultimately composed this opinion letter addressed to the two companies.

Q. Would you explain for the record just what these three documents are?

A. Well, the first document, 1-A, is a letter in which we set forth the considerations that the—the points that were considered in our firm which arrives at the view, the conclusion, the recommendation as to a range for the possible merger of Christiana into du Pont. The Exhibit 1-B is a compilation of exhibits with information—14 exhibits, information about the du Pont Company, memoranda of fact of du Pont and Christiana, financial statements of du Pont and Christiana which had been prepared in our office from information furnished to us by the companies, information relative to the common stock prices of du Pont and Christiana, analysis of the market volume and price for both companies on specified dates, the net asset value and discounted market price of Christiana securities. The effects upon du Pont common stock of various discount values. The effects upon Christiana common stock of various discount values. An

[28]

exhibit showing the market price of du Pont $4.50 preferred stock. Another exhibit showing the market prices of Christiana's 7 percent preferred stock. And the final exhibit, a market price study of Wilmington Trust Company common stock.

Q. Were all of these exhibits that you have identified considered by Morgan Stanley in arriving at its opinion?

A. Yes, sir.

Q. All right. What is Exhibit 1-C?

A. Exhibit 1-C is a one-page letter which comments—gives our comments on the exchange ratio which we then understood had been negotiated by the two negotiating committees. And that resulted in the proposed merger at 2½ percent discount from Christiana's net asset value.

In this letter we say we believe the discount arrived at by the negotiating committees is reasonable and fair and not overreaching.

Q. You had been informed of the terms arrived at by the negotiating committee by the time Exhibit 1-C was written?

A. That is correct, sir.

Q. Now, would you tell us in brief focus the procedure that was followed by your firm from the time of your engagement up to the rendering of the opinions you have identified?

[29]

A. Well, as I said, sir, we organized a committee, a group of which I was the leader, to prepare factual information that was then distributed to others within the office, some dozen and a half to 20 people, senior partners and experienced staff. This group arrived at a view as to the range of possible exchange ratios which was contained

in a draft memorandum submitted to the negotiating committees and their counsel under the date of June 27. On June 30 our group from the office, including the senior partner of the firm and myself and others, traveled to Wilmington to meet with the negotiating committees and their counsel and the other investment banking firms, First Boston Corporation and Kidder, Peabody & Co.

Q. Is that your first meeting with the other investment banking companies involved?

A. On this particular matter, yes, sir. And it was at that meeting that the three firms proposed their three independent views as to what the range of proposed exchange ratios should be.

Q. What was your personal participation in that meeting of the negotiating group?

A. It was my responsibility to present our recommendation, if you will, to the negotiating committees and their counsel, and I did so.

Q. Do the views set forth in Exhibits 1-A, B and C

[30]

represent merely your personal views?

A. No, sir. As I have said, the process we follow leads us to produce for a client the firm's view, the view of Morgan Stanley & Co.

Q. And the process you described earlier for routine matters was followed in this case?

A. Yes, sir.

Q. Would you refer, Mr. Townsend, to page 4 of Applicants' Joint Exhibit 1-A, your opinion of July 7, 1972, particularly to the bottom of that page where the statement is made "Since Christiana is an investment company the assets of which consist almost entirely of marketable securities, we believe it is appropriate to consider its value

in terms of the market value of its underlying investments which is the normal way of valuing investment common stock." Do you see that statement?

A. Yes, sir.

Q. What was the basis for that statement?

A. Well, we consider it is the normal way of evaluating investment companies, to take a look at the underlying market value of their securities portfolio. Part of the evidence that supports this conclusion is the procedures that appear to have been followed in other investment company mergers, and particularly in merger cases that we have studied to develop a view as to how to make our

[31]

recommendations to Christiana and du Pont.

Q. At page 9 of Exhibit 1-A, in the paragraph numbered 1 at the top of the page there, would you read that, please?

A. The opening "We have studied?"

Q. No, "Generally."

A. "Generally the market values of the investment companies where a market value existed were at a discount from the underlying net asset values prior to the merger negotiations."

Q. Had you conducted any studies to support that proposition?

A. Yes, sir, we had. We conducted a study—we conducted studies of a number of investment company mergers with their operating affiliates.

Mr. Gribbon: I should like here to ask that there be identified as Joint Exhibit 5 a 21-page compilation entitled "Summary of Terms of Comparable Mergers, Morgan Stanley & Co."

(Applicants' Joint Exhibit 5 was marked for identification.)

By Mr. Gribbon:

Q. Was Joint Exhibit 5 prepared under your supervision and direction?

A. Yes, sir, it was.

[32]

Q. Let me ask you, was this exhibit prepared in—in its present form prepared prior to the submission of your opinion of July 7?

A. No, sir, it was not. It has been prepared in this form within the last month or so.

Q. What does Joint Exhibit 5 purport to show?

A. It analyzes 10 mergers of investment companies with their affiliates, their operating affiliates. Six of these mergers were subject to review by the Securities and Exchange Commission, five of those in a proceeding like this proceeding. Four—I don't mean to imply a hearing, but under the same part of the Act. Four were not subject to the Investment Company Act of 1940.

Now, if I may——

Q. Would you identify the six that were subject——

A. To the Commission's review?

Q. Yes. And point out where reference to them will be found in Exhibit 5.

A. Right.

On pages 1 and 2 is the information relative to the merger of Detroit and Cleveland Navigation Company into Denver-Chicago Trucking Company, Inc. At the time the merger took place Detroit and Cleveland had been selling, although in a limited market, at about a 16.9 percent discount from the net asset value. It was merged into

[33]

Denver-Chicago nevertheless on the net asset value basis.

Q. And does Exhibit 5 in the body of the exhibit set forth the relevant factors with respect to that merger?

A. Yes, sir. On pages 1 and 2.

Q. What is the next one?

A. The next one, pages 3 and 4 contains information about the merger of Delaware Realty into Christiana Securities Company. Prior to the merger Delaware had no market. The merger was accomplished on a basis that provided Delaware shareholders with assets less 1½ percent from their net asset value.

Pages 5 and 6 contain information relative to the Prudential Investment Company into the Axe Houghton Fund. This is one in which the Commission reviewed the fee paid to an advisor. Prior to the time of the merger Prudential had been selling at a 17.6 percent discount from its net asset value; nevertheless, it was merged into Axe Houghton on a net asset basis less the advisor's 2 percent fee.

On pages 7 and 8 is information relating to Huyler's merger into the Altamil Corporation. There was no market in Huyler's, but the two companies were merged on a net asset basis.

On pages 9 and 10 are data relating to the merger of Eastern States Corporation into the St. Regis Paper Company.

[34]

Eastern States had been selling in the market at a 2½ percent discount from net asset value; nevertheless, it was merged into St. Regis at net asset value.

On pages 11 and 12 Harbor Plywood Corporation was merged—information relating to Harbor Plywood into Hunt Foods and Industries. And while Harbor Plywood had been selling at a 13½ percent discount in the market Harbor was merged into Hunt on a net asset value basis after an adjustment to Harbor's net asset adjustment, an upward adjustment.

Q. Does that complete the list of transactions that you found?

A. Subject to the '40 Act, yes, sir.

Q. And were there other transactions that you studied?

A. Yes, sir. The merger of the United States Foil Company into Reynolds Metals Company, in which there was a substantial discount in the market for United States Foil stock but nevertheless United States Foil was merged into Reynolds at net asset value. That information relative to that merger is on pages 13 through 15.

On pages 16 and 17 of this exhibit is information relating to the merger of Beneficial Corporation into the Beneficial Finance Company. And while Beneficial Corporation was trading at a 17.3 percent discount from its net asset value, it was merged into Beneficial Finance at a premium

[35]

of .6 percent over net asset value.

On pages 18 and 19 are data relating to the merger of United Utilities Company into the American Water Works Company, Inc. There was no market for United Utilities stock; the merger was accomplished on a net asset value basis.

The last part of this exhibit, pages 20 and 21, relates to the merger of Eccles Investment Company into the Utah Construction and Mining Company. Again there was no market for the holding company common stock, but it was merged into Utah Construction at a discount of 1.83 percent from its net asset value.

Q. Now, Mr. Townsend, did Morgan Stanley study each of these 10 transactions prior to the rendition of its opinion to the board of directors?

A. Yes, sir, we did.

Q. What conclusions do you draw from this study as they may be relevant to the terms of the merger under consideration?

A. One conclusion one draws is that net asset value is a basis for considering the value of an investment company as it is merged into its operating affiliate. One can also conclude that in many of the cases the investment company was merged into its operating affiliate with no discount whatsoever, and in one case a premium, slight premium. In two of the cases there was a discount from net asset value, the one of 1½ percent in Delaware Realty and the one of 1.83

[36]

percent in the Eccles Investment Company.

Q. What was the maximum discount that you found in your examination of these?

A. The latter figure.

Q. 1.8?

A. Yes, sir.

Q. Was your examination of these 10 transactions a significant part of the support for the statement that appears at page 9 of your opinion, Exhibit 1-A?

A. Yes, sir.

Mr. Murtaugh: The letter of July 17th?

Mr. Gribbon: 7th.

The exhibit was prepared after this.

Mr. Murtaugh: Can I get the last question and answer, please?

Judge Ullman: Would you read the question and answer, please.

(The question was read back.)

The Witness: Yes, sir.

By Mr. Gribbon:

Q. I want to make clear, I think you testified earlier, Mr. Townsend, that Exhibit No. 5 in its present form was prepared after your opinion?

A. Yes, sir.

Q. It was prepared in preparation for this hearing,

[37]

was it not?

A. Yes, sir.

Q. Did you, however, study the transactions that are set forth in Exhibit 5 prior to the rendition of your opinion?

A. Yes, sir.

Q. And in connection with your analysis of the proper terms of the du Pont-Christiana merger?

A. Yes, sir, we did.

Q. Now, is it your testimony that in evaluating investment companies for merger purposes, it is inappropriate to make any adjustments to net asset value?

A. May I have that question again?

(The question was read back.)

The Witness: No, in some cases it is appropriate, sir. Some of the examples had adjustments, and as I think is set forth in our opinion letter dated July 7 we have suggested that certain adjustment be made to Christiana's net asset value.

By Mr. Gribbon:

Q. Let me ask you to refer to pages 12 and 13 of your opinion of July 7, Exhibit 1-A, and indicate where appropriate as each of the assets of Christiana is listed there whether or not an adjustment was made and why it was made.

A. Yes, sir.

[38]

Q. Do you have that exhibit and the tabulation?

A. I have pages 12 and 13 in front of me, yes, sir.

Q. What does that tabulation purport to show, first?

A. That tabulation purports to show our estimated adjusted net asset value of Christiana and Christiana common stock.

Q. All right. Will you take each of the assets that are listed there and explain whether there was an adjustment, and if so, what it was?

A. Yes, sir.

The du Pont common stock is listed for those who have it in front of them—du Pont common stock and preferred stock was listed at their then market values. I say then market values. The market prices were taken as of May 31. The Wilmington Trust common stock was added in at its market price of May 31 less an adjustment for the estimated expenses of selling that block and the capital gains taxes associated therewith because we had been informed by du Pont Company that they did not wish to hold the Wilmington Trust common stock, so that you might say that we made that adjustment in view of what du Pont planned to do with that asset.

Q. That adjustment was twofold: for taxes and for expenses of sale?

A. Expenses of sale, that is correct.

As far as the News-Journal Company is concerned,

[39]

we were instructed by both companies that they were going to retain an expert to appraise the value of that company which had no public market for its stock. The gross value shown in the tabulation of 24,250,000 is the value he came up with. However, we have deducted in

making our adjustments to Christiana's net asset value the estimated capital gains taxes that would be associated with that sale, because again du Pont told us they did not wish to hold onto that asset.

Now, in the cash and equivalent account shown here on this page of 4,238,875, an adjustment had been made to remove $1 million from Christiana's cash and equivalent because we had been informed that insofar as Christiana's tax claim was concerned it would be impossible to value that as part of Christiana's net assets at this time and that the Christiana's board would be organized to pursue this claim in the future following the merger and that a million dollars would be taken out of Christiana's cash account to support this litigation.

The final adjustment that we made we were instructed by the companies that they estimated the expenses of the proposed merger were one and a half million dollars, and we removed that entirely from Christiana's net assets. All of the foregoing results in an aggregate net asset value for Christiana of 2,307,000,000, and we then removed Christiana's 7 percent preferred stock at $120 a share—

[40]

Q. What was the basis for your treatment of the Christiana 7 percent preferred stock?

A. The company asked us and we recommended to them that in view of the preferred stock's liquidating value of $100 a share, its redemption price of $120 a share, and that in a merger these shareholders—the holders of this stock would have appraisal rights, there was likelihood that a court would award them $120 a share. We recommended that du Pont offer the Christiana shareholders $120, the market value of du Pont common stock in exchange for their stock.

As I was saying, if you remove the aggregate for that, or 12,780,000, the adjusted net asset value available to holders of Christiana common stock comes out at $2,294,760,000. These are the adjustments, sir, that we made.

Q. Are they explained in the notes to this table?

A. Yes, sir, I believe they are.

Q. Let me just make sure. You mentioned a tax claim of Christiana. Where does that figure enter into your final net asset value figure? Any value given to that?

A. No value is given to that. Christiana's books of account show I believe some $11 million for that asset, so-called. We did not include that in Christiana's assets as we tabulated them on pages 12 and 13.

Q. What provision was made for any ultimate recovery in that case?

[41]

A. Well, I think I explained that the companies— the participants agreed that in view of the fact it was impossible to determine value at this point, that a special committee be set up to pursue the tax claim following the merger and that once the tax claim—the litigation had been completed and a decision made, du Pont's stock equivalent to the proceeds less any of the $1 million remaining would be distributed to the Christiana stockholders.

Q. Were you, Mr. Townsend, aware during the entire time you were studying this matter that a tax-free merger was being contemplated whereby du Pont would give shares of its stock in return for the assets it received from Christiana?

A. Were we aware, sir?

Q. Yes.

A. That a tax-free merger was being contemplated here?

Q. Right.

A. Yes, sir.

Q. If the transaction that you were studying contemplated that du Pont purchase the assets of Christiana with cash, would you have recommended a net asset value transaction as computed at page 12 here?

A. No, sir, we would not. That was a different transaction, and we did not consider that type of a transaction.

Q. At no time in your work were you asked to consider

[42]

the cash value let us say of the Christiana assets?

A. No, sir.

Q. Now, you have testified that two of the advantages to Christiana of the proposed merger were a significant appreciation in the market value of the holdings of Christiana shareholders and an elimination of the corporate —inter-corporate dividend tax that Christiana was paying on dividends from du Pont. Do you recall that testimony?

A. Yes, sir.

Q. Now, to what extent in your opinion would it have been fair and reasonable for the non-Christiana shareholders of du Pont to participate in those benefits flowing to the Christiana shareholders?

A. Well, in this transaction, which in essence is a transfer of du Pont stock for du Pont stock, and looking at the precedents, it doesn't seem that it would have been fair at all for du Pont to have participated in this increase in market value or reduction in taxes. And in fact, it might have been unfair and overreaching.

Q. Is it your opinion—it is your opinion as expressed here that the merger terms were fair and reasonable to du Pont?

A. Yes, sir, that is our opinion.

Q. What is the basis for that opinion?

A. Well, as I say, in a—if Christiana had existed

[43]

as nothing but a block of du Pont stock, and in effect 98 percent of Christiana was du Pont stock, the shareholders of du Pont other than Christiana in a share-for-share exchange were being treated fairly, and as I say, in our view had no basis for believing they should participate in the benefits to Christiana of an increase in market value and a reduction of income taxes.

Q. In your opinion were the non-Christiana shareholders of du Pont receiving fair value for the shares of du Pont that were being issued to the Christiana shareholders?

A. Yes, sir. As I say, if the transaction had been nothing but a switching of du Pont for du Pont, they would have received fair value. And I think I should add that as to the other 2 percent of the assets, we felt we had made a sufficient adjustment to protect the du Pont stockholders in the exchange of du Pont stock for those assets.

Q. Page 15 of your report, Joint Exhibit 1-A, the opinion is expressed that an exchange ratio which recognizes a discount from Christiana net asset value is appropriate. Now what is the basis for that opinion?

A. Well, sir, we felt that the advantages to Christiana are clear, they are quantifiable, they are very clear. The advantages to du Pont are—while they are considerable, are not so clear. And it was our view and our recommendation to Christiana that they in accepting a

[44]

discount from their net asset value offer a financial inducement to the shareholders of du Pont to approve the transaction.

Q. Did you see any disadvantages to du Pont in the proposed transaction?

A. As I said before, there could have been some selling of du Pont common stock received in the merger, but we thought that that disadvantage, or that market impact, if you will, would be brief and modest in its nature.

Q. All right. Still referring to page 15, I point to the figures you ultimately come to there in which you recommend a discount in the range of .5 percent to 2.5 percent as being reasonable and fair to both companies and not representing overreaching by either party. What was the basis at which you arrived at that range of discount figures?

A. Let me say here that these numbers, while they look very exact, are the results of informed judgment of the group of people in the office who studied the matter. There is no way to take a calculating machine or a slide rule and come up with those numbers, and it would be unfair for me to represent that that is how we did it. However, taking a look at those numbers, a half percent is equivalent to about $10 million, and 2½ percent is equivalent to about $55 million, and we felt numbers of that size would indicate

[45]

Christiana's desire to induce the du Pont stockholders to follow through with the transaction.

Q. Did you have any particular precedents in mind in arriving at this range of discounts?

A. Well, certainly we had—the one I think we felt was most relevant was the Delaware Realty into Christiana.

And that as you recall was done at a 1½ percent discount. The range we have shown here or recommended here gives a measure of flexibility on either side of that 1½ percent.

I think, furthermore, we had in mind the transactions wherein Christiana exchanged out General Motors stock and Hercules stock for its own common stock wherein the transaction was done at net asset value—full net asset value. And we felt that this also gave us some substantiation for the range we have here.

Q. Were you aware of any transaction comparable in nature where there was a discount of as much as 2.5 percent from net asset value?

A. No, sir, we were not. As I think I mentioned before, the one that we were aware of at a large discount was the 1.83 percent discount in the case of Eccles Investment merger into Utah Construction.

Q. Why did you feel warranted in recommending that these companies adopt at the upper end of your range a discount higher than any you had found in any comparable

[46]

transactions?

A. Well, again, as I say, the advantages to the holders of Christiana were very substantial and easily seen. And it was our judgment that a number at the higher end of the range was possible—it was possible that a number at the higher end of the range would be necessary to induce the du Pont stockholders to vote in favor of the transaction. That 2½ percent discount, as I mentioned, is equivalent to about $55 million in market value, from net asset value of Christiana.

Q. From the viewpoint of Christiana and its shareholders, what was the basis of your recommendation that a discount greater than 2.5 not be accepted?

A. Well, again, as you have noted, 2½ percent is the largest—if the transaction goes through will be the largest such discount apparently on the record. We felt that anything larger than that would be very difficult for us to recommend to Christiana in view of the precedents, the record, in view of the fact that Christiana stockholders we believe think that they hold the equivalent underlying number of du Pont shares and would not be agreeable to losing a significant part of that underlying investment. These are the reasons, sir, we felt that 2½ percent was probably the maximum—was the maximum limit that Christiana should accept.

[47]

We had also to take into account the fact that Christiana did not have to go through with this transaction and that at some point the cost would be too great.

Q. What do you mean Christiana didn't have to go through with it?

A. There was no requirement that Christiana be merged into du Pont. This was a—while they had initiated the transaction as I understand it, their negotiating committee had to be assured that the price—or the cost to them of entering the merger negotiations was not excessive.

Judge Ullman: You mean there was no court order or Commission order or anti-trust aspect.

The Witness: That is correct, sir.

By Mr. Gribbon:

Q. Was it your opinion that a discount in excess of 2.5 percent should be unacceptable to the Christiana shareholders despite the benefits they were getting?

A. I think that is what our opinion means, yes, sir. Our letter dated July 7.

Q. What did you have in mind as ways by which the Christiana shareholders might ultimately obtain the du Pont shares that they owned indirectly?

A. Well, another possible method for Christiana shareholders to obtain their du Pont stock could have been through a liquidation of Christiana. Now, I think we should

[48]

note that of the Christiana shareholder—Christiana shares outstanding, approximately one-eighth of them are held by people who would have no cost in taxes in such a liquidation.

[49]

Q. Why is that?

A. Because they are tax exempt institutions and would incur no tax in a liquidation of Christiana and the distribution to them of their du Pont shares.

We actually were considering, and up until a very late date in the procedure here, a special form of liquidation, namely liquidation under Section 333 of the Internal Revenue Code. We understood that it might have been possible for Christiana to liquidate under that on a very advantageous basis and at relatively modest tax expense.

Counsel had advised us throughout the procedure that they were studying this, and at the time—I should say I guess at the time of our meeting with the negotiating committees in Wilmington on June 30th the estimate I believe at that time was that the possible aggregate tax costs of a Section 333 liquidation would range between 40 million on the low side in taxes to the Christiana shareholders to 70 million on the high side.

Now, the 70 million on the high side is equivalent to about 2.8 percent of Christiana's net asset value, and it

was this number that we at that point used as somewhat of a benchmark. We figured that Christiana's officers and counsel would attempt, if they had to follow a Section 333 liquidation, to obtain a lower tax cost than the maximum then estimated, and at that time it was our—we figured that Christiana

[50]

probably should set 2 percent as a merger discount as the upper limit which they should be agreeable to accept. And that is what we recommended at the June 30th meeting.

Q. And you subsequently changed the upper range of your recommended discount to 2.5 percent.

A. That is correct, sir.

Q. What was the basis for that change?

A. The basis for that change was that counsel informed us that after thorough study it was not feasible any longer to consider a Section 333 liquidation for complicated reasons as to the estimation of Christiana's accumulated earnings and profits.

Q. What effect did that have upon your analysis?

A. Well, with the 2.8 percent benchmark as the maximum, we figured that Christiana could under those circumstances be willing to accede to a 2½ percent discount rather than a 2 percent discount and still the transaction would be fair and reasonable.

Q. What did you understand to be the obstacle in the way of a 333 liquidation at this time?

A. Well, as I said, sir, it is in the determination of Christiana's accumulated earnings and profits, and how this had been affected by the merger into Christiana of Delaware Realty.

Q. Were you advised that a 333 liquidation was off for

[51]

all time?

A. No, sir; that it was not feasible as of that date. Not feasible any longer for us to consider in the process we were going through.

Q. Now, you referred earlier in your testimony to a conventional liquidation, I believe.

A. Yes, sir.

Q. How does that differ from the 333 liquidation in your thinking? I don't mean the technicalities of it, but—

A. Well, that there would be a very much more material tax cost to the low basis stockholders of Christiana, making it a somewhat unlikely event—an unlikely event.

Q. But in that connection you did mention certain groups of stockholders that would be benefited by a conventional liquidation?

A. That is correct. The tax exempt shareholders who would have no tax cost in a liquidation.

Q. And any other stockholders in that position?

A. Well, an analysis of Christiana shareholders leads one to believe that there are some high basis shareholders; exactly how many shares are involved in that, we have identified perhaps three percent, but that is certainly a minimum, of the Christiana stock is high basis stock. And they would have modest cost in a liquidation of Christiana.

Q. What is the impact of the 2.5 percent discount

[52]

that has been agreed upon with respect to your tax exempt Christiana shareholders and the high basis shareholders?

A. Well, it has removed 2½ percent of their underlying net asset value.

Q. Did you have in mind the existence of this tax exempt group and high basis shareholders of Christiana in developing your analysis?

A. Yes, sir, we did. We thought that anything higher would be unfair to these people.

Judge Ullman: There will be a recess for ten minutes.

(Short recess taken)

Judge Ullman: The hearing will please come to order.

By Mr. Gribbon:

Q. Mr. Townsend, in considering the terms to recommend to the du Pont and Christiana committees did Morgan Stanley take into account the possible impact upon the market value of du Pont shares of consummating this merger?

A. Yes, sir, we did.

Q. Let me ask you, at what point in your consideration of this matter did the possible impact of the transaction enter into your thinking?

A. I think right at the outset, sir, we were asked by the participants, or counsel for the participants, to

[53]

consider this matter as a factor that should be weighed in coming up with a merger exchange ratio.

Q. Is there a reference to that factor in your final report?

A. I believe, sir, there is. I will have to find it. I think you will find it, sir, on page 8.

Q. And what is your assessment of that factor?

A. Well, I think we said here, and if I may quote, a possible disadvantage to du Pont of a merger would be that the broader market for du Pont shares and the elimination of the effective discount might encourage certain Christiana stockholders to dispose of their holdings, thereby

depressing the market for du Pont common stock. However, when the potential capital gains tax liabilities of large Christiana stockholders are taken into account we do not believe that there will be such disposals as would have a material and lasting impact upon du Pont's common stock price.

Q. Now, looking at the merger itself, what effect would it have upon the market value of du Pont common stock, in your opinion?

A. Well, the merger itself, if you mean the transfer to Christiana stockholders of du Pont common stock, would not in and of itself have any effect whatsoever on the du Pont market price.

Q. Now, that is notwithstanding that there would be

[54]

some 700 or—some 7500 or 8,000 shareholders rather than one shareholder of these shares?

A. No. To have an effect on market price there would have to be some significant sales.

Q. Did you consider whether it was reasonable to expect significant sales?

A. Yes, sir, we did.

Q. What conclusions did you draw?

A. Well, in the first place one of the conditions of the merger's going through was that it be tax-free to Christiana stockholders. Thus they could receive the du Pont stock without any adverse tax consequences. Secondly, and I might say unlike the General Motors situation, there was no legal reason why Christiana common stockholders had to divest themselves of the du Pont stock.

Thirdly, and as I think I have said before, we believe Christiana stockholders view themselves as holders of du Pont, if indirectly, and so receiving the du Pont directly should represent to them a continuity of interest. And for

that reason we did not feel they would be impelled to sell du Pont common stock.

It is not like another merger where a steel company merges with a chemical company or even two chemical companies. The Christiana common stockholder would have in effect directly what he had been holding all along.

[55]

Fourthly, and as is mentioned here in our letter, we were familiar with Christiana's stockholders and the basis of the stock to them.

Q. Tax basis.

A. Tax basis. Excuse me. The cost basis. And the cost that would result to them would be substantial in any disposal of the du Pont stock they received.

I think that something on the order of 70 percent of the Christiana common stock has a very low if not a zero tax basis. And we thought that selling the du Pont stock and incurring those very substantial taxes would inhibit their coming into the market with that stock.

Q. What was the basis of your knowledge or information with respect to the tax basis of Christiana shareholders?

A. Well, a lot of the stock—we were familiar with the fact that a lot of the stock had been held for a long time and thus would have a low basis. Secondly, in the divestiture of General Motors the tax relief legislation caused the basis of Christiana and du Pont common stockholders to be reduced by the market value of the General Motors they received. So that I think there was a total of some $70 worth of GM common stock that these people received, and anyone who had a basis of 70 or less would have had a zero basis as a result of the GM distributions.

Q. Now, what was the net result of all of these factors

[56]

in your consideration of whether the merger would lead to substantial sales by the former Christiana stockholders?

A. Well, we thought that there might be some selling. Obviously there will be some selling by small stockholders. We thought that the somewhat more liquid or greatly more liquid du Pont market would absorb these sales; that as to holders of large blocks of stock, if they chose to sell, or, for instance, if some of them died and their basis moved up and they had to pay estate taxes, these people were of such a nature, they are sophisticated people, they would do it in a manner that results in obtaining for them the largest proceeds, probably through underwritten public offerings.

Now, underwritten public offerings do have market effects. We know that. But these, if the offerings are done in a proper manner, are modest in size and not extensive in length.

Q. Were you advised, Mr. Townsend, at the time you were preparing your analysis, that there were in contemplation any substantial sales of du Pont stock by the former Christiana shareholders?

A. No, sir, we were not so advised.

Q. The opinions you have expressed here are based upon your prior experience and knowledge of the make-up of the Christiana shareholder group. Is that correct?

A. Yes, sir. The facts that I have enumerated led us

[57]

to make, if you will, an informed judgment that there would not be a material and lasting effect on the market for du Pont.

Q. Were you aware that in conjunction with the merger there was to be provision for registration rights on behalf of certain of the former Christiana shareholders?

A. Yes, sir, we were aware of that. But that did not surprise us because in most mergers these days such provisions are part of the merger agreement.

Q. Did you in forming the judgment that was expressed at page 8 of your opinion take into account the possibility that there might be significant sales of du Pont stock by former Christiana shareholders?

A. Yes, sir. As I said a moment ago, if a shareholder of Christiana died and his basis moved up, and furthermore his estate had to pay taxes, there could very easily be possible sales in the future. These would be, as I say, probably done in an underwritten manner, and probably subject to registration under the 1933 Act.

Q. Has Morgan Stanley had any experience in the handling of sales of the character you have just described, underwritten and registration?

A. Yes, sir. I guess the best example would be last year, the year 1972, where we managed as managing underwriter very substantial stock sales in Avon Products, in Eli Lilly, S. S. Kresge, and Johnson and Johnson.

[58]

Q. Have you had prepared under your direction and supervision an exhibit of tables showing the market impact of secondaries that Morgan Stanley has managed in the last year?

A. Yes, sir. We have charts showing the market impact of those four offerings I have just mentioned, as well as the four General Motors secondaries that took place during the divestiture period.

Mr. Gribbon: I should like to have marked for identification as Applicants' Joint Exhibit No. 6, a tabulation and series of eight charts captioned "Information Relating to Certain Large Secondary Offerings, Morgan Stanley and Company."

(Applicants' Joint Exhibit No. 6 was marked for identification.)

By Mr. Gribbon:

Q. Was Exhibit 6 prepared under your direction and supervision?

A. Yes, sir, it was.

Q. Referring first to the four offerings that you mentioned by name, would you please state for us the salient aspects of each of those four offerings. Show us on this exhibit where they are set forth.

A. All right. Let me say that the method we have used to attempt to measure market impact is a rough method.

[59]

What we have done is we have assumed that some point prior to the date that an offering of this type is announced the market will be unaffected by any knowledge of the offering. And what we have done is in a standard fashion gone back fifteen days prior to the date that a proposed offering is to be made and given that an index number of 100.

Now, the index we are talking about here is a relative index. It compares the market price of the stock in question with the Dow Jones Industrial Index so that if the Dow Jones Industrial Index moves one percent up and the stock moves one percent up, the relative index, namely the line shown on these charts, would remain at 100. If the Dow Jones Index moves up more than one percent and the stock doesn't move at all, the relative index number shown on the chart would go below 100.

If, on the other hand, the stock percentage-wise moved more than the Dow Jones, the relative index number, the number that is graphed on this chart, would go above 100.

Now, as I say, taking a point fifteen days prior to the announcement or public knowledge—demonstrated public knowledge of a deal, we have given that an index number of 100. Now, if you will turn to Chart 5, which is the Johnson and Johnson chart; this covering was of 1,585,000 shares of Johnson and Johnson, and it was offered to the public at $109.75 for an aggregate offering of $173,953,000.

[60]

The stock marketed represented 2.8 percent of the outstanding stock of Johnson and Johnson and amounted also to 43.6 percent of the previous year's trading volume in Johnson and Johnson.

Now, if you will trace the line you will see that from the marked 15th day prior to announcement Johnson and Johnson did relatively better than the Dow Jones and the line is above the 100 line on the chart. On the date of the announcement there was a substantial market effect, and the line goes below 100. But that following the date of the announcement and thereafter, Johnson and Johnson did substantially better than the market. And I think except for the date of the announcement one can say this issue had no effect on the market. There was no market impact.

Q. Have you in a similar fashion to Chart 5 charted the market impact of the other three major secondaries that you mentioned: Kresge, Lilly and Avon Products?

A. Yes, we have, in Charts 6, 7 and 8.

Q. Could you tell us what your judgment is based upon these charts as to the market impact of each of those offerings. First, Avon Products.

A. That is Chart 8. Again there seems to have been an effect on the date of the announcement—an adverse effect on the price of Avon stock. However, several days after the date of the announcement the index moves up to 100 and

[61]

continues at or above 100 thereafter. And we would say that there is little and very brief market effect in connection with that Avon secondary.

As far as the Kresge offering, Chart 6, there does not seem to be any apparent market effect.

Q. What was the market value of that Kresge offering?

A. It was about $266 million.

Q. What percentage of the outstanding stock of the company was that?

A. Just under 7 percent, and 44.6 percent of the previous year's trading volume.

Q. Almost half of the previous year's total trading value.

A. That's correct.

Now, Eli Lilly requires some explanation. Eli Lilly fared more poorly than the Dow Jones—or poorer than the Dow Jones following the date of announcement and did so for a period of about 3½ months. It should be noted, however, that on the 13th of April, which is in the middle of this period, an announcement was made to the public that there was some doubt about the efficacy of one of Lilly's major products. And this was in the middle of our offering period, and we can say had a very material adverse effect on the market. So that you have that other effect in here which tends to—which has tended, in our view, to keep the

[62]

stock depressed.

Q. You recognize that there may be other effects of this same kind that you spoke of in Lilly, either good or bad, in the other market offerings?

A. Yes, sir, we would. And that is why I characterize this method of analysis as but a rough one.

Q. Now, you also have charted four offerings of General Motors stock; is that correct?

A. Yes, sir.

Q. And what market impact in your judgment is seen in those offerings?

A. Well, the first such offering, which was done at the end of July 1962, was the first offering of General Motors stock as a result of the divestiture. The market was a very weak market as those here who remember that period will recall, and a number of offerings of stock scheduled earlier in the year had to be postponed.

There was considerable doubt in our office as to whether to proceed with this General Motors issue. However, looking at the index line it seems to have been done in a manner that resulted in no adverse market effect. Because the number does not go below the 100.

Q. Is that true of the second General Motors offering?

A. No, sir. There was a substantial effect that appears in the second and third General Motors issues. So that

[63]

in the second issue, which was done again in 1962 but in November, approximately the same size in number of shares as the first issue—and I should mention the first issue amounted to about $78 million in the aggregate, and this second issue, $87 million in the aggregate. But it took

a period of some thirteen-odd weeks for GM to come back to a point where one might say it was trading on a better basis than the Dow Jones Industrial Index.

Q. Would you refer to the last General Motors offering, Chart 4. It was the largest, was it not?

A. No, sir. The third one was the largest. The third one amounted to almost $307 million of General Motors stock. And there was a period of about 4½—I guess it is about 22 weeks when General Motors performed less well than the Dow Jones Industrial Index.

Q. Mr. Townsend, do you know whether all of the General Motors offerings you have referred to so far took place during the course of the divestiture ordered by the court?

A. Yes, sir. The first three did. I am not certain, I don't recall the last—whether the last one did too.

Q. Do you remember the cut-off date for the divestiture?

A. No, sir, I don't.

Q. What was the market experience as shown on the last of the General Motors offerings?

[64]

A. The market experience was such that there was a modest effect actually occurring prior to the public announcement, so that news of it had been I guess leaking out. But that between the date of announcement and the date of the offering General Motors began to do better than the Dow Jones and continued to do that thereafter.

Q. Now, what conclusions based upon your experience in Morgan Stanley as set forth in these charts do you draw as to the capacity of the market to absorb substantial blocks of stock?

A. I think these charts would lead one to the conclusion, and they have led me to the conclusion that in

organized secondary offerings, underwritten secondary offerings of common stock there is frequently a market impact, an adverse market impact, but that if the offering is done well and made properly, that this market impact will disappear over a period of time following the issue.

Q. Have you formed an opinion as to the volume of du Pont stock that might be sold in secondaries of the kind you have described over a period of, say, five years, and what impact sales of the magnitude you have taken into account would have on the market in your opinion?

A. Sir, I have not formed an opinion as to how much du Pont stock would come into the market.

Q. No, I am asking you to express an opinion if you

[65]

have one as to how much the market could absorb without regard to whether the shares are going to be sold or not.

A. If you would permit me to state it another way, if, for instance, say 10 percent of the du Pont Company were to come into the market, in today's market that would amount to around eight or nine hundred million dollars of du Pont common stock.

Q. How many shares would that be roughly?

A. 4.7 million, just under 5 million. It is our view that a marketing program could satisfactorily distribute this block of stock over a, say, three to five-year period with nothing more than periodic market effect which would occur at the time of the issues and which would be dissipated following the issue.

Q. And when you speak of periodic, what period of time do you have in mind? What are the ranges?

A. Something on the order of those ranges we have seen in these charts here. It would be difficult to tell. Maybe a month, maybe two months, maybe even three months, depending on the market conditions at the time,

the way in which the underwriting has been done. We would not want to recommend that sellers of du Pont stock overtax the market at any particular time, and the size of the issue would have to be gauged accordingly.

Q. What is your opinion as to whether there would be

[66]

any lasting impact on the market value of the du Pont stock if a program along the lines you have assumed, that is, a sale of 10 percent of du Pont, were undertaken over five years?

A. I think what I have said, sir, is that there would not be a lasting impact. There would be an impact which would coincide with the times of the specific secondary issues.

Q. Now, before we leave this subject I want to make clear on the record here, have you knowledge, Mr. Townsend, of any plan on the part of anybody to dispose of anything like 10 percent of the du Pont stock over the next five years?

A. No, sir.

Q. In your analysis were you informed that there were any substantial sales in contemplation?

A. No, sir.

Q. And what you have just testified to is a hypothetical situation?

A. That is correct, sir.

Q. Have you in connection with your testimony here charted the market performance of du Pont and Christiana shares during the period that this merger has been under consideration?

A. We haven't charted it but we have put together a tabulation of du Pont and Christiana's market prices and volume.

[67]

and if you will, a relative index, such as we were talking about in these secondary issues relating to each of them.

Mr. Gribbon: May I ask that there be marked for identification as Applicants' Joint Exhibit No. 7, a six-page statistical preparation captioned "Market Study of Christiana Securities and Du Pont Common Stocks, Morgan Stanley and Company."

(Applicants' Joint Exhibit 7 was marked for identification).

By Mr. Gribbon:

Q. Was Applicants' Exhibit No. 7 prepared under your supervision and direction?

A. Yes, it was.

Q. And is it the series of tables showing the relative performance of du Pont and Christiana stock?

A. Yes, sir. It is a list of Christiana's daily bid price and volume and du Pont's closing price and volume for each day of 1972 and for a few days in early 1973.

Q. Would you explain to us how you have integrated into these charts your Dow Jones Index?

A. Yes, sir. It also shows, I should say, the closing Dow Jones Industrial Index on each day during the period, as well as the Standard and Poor Chemical Industry closing price and index and a relationship of the du Pont price index to the Standard and Poor's Index which we should leave

[68]

aside for the moment.

If you will turn to page 2, let me recall for you-all that the merger—proposed merger, the fact that the companies were studying it, was made—an announcement of

that was made on April 28, 1972. So that in order to measure our index we had to—what we did was in a fashion similar to that on the previous charts we went back to April 10th and called that our base date. And if you-all keep looking at columns headed G and M, column G is the relationship of Christiana to the Dow Jones, and column M is the relationship of du Pont to the Dow Jones. So that if you look in those two columns, on April 10th you will find the figure 100.

Q. April 10th, then, prior to the announcement of the merger?

A. Prior to the announcement that the companies were studying the possibility of a merger.

Q. This gears the price of Christiana and the price of du Pont to the Dow Jones at 100 on that date.

A. Yes, sir.

On the date of the announcement, April 28th, you will note that as of the closing that day Christiana had gone to 101.795 as an index number, and du Pont had gone to 96.95. The announcement was made after the closing of the market so that the effect on Christiana did not appear until the following trading day, which was Monday, May 1st. And

[69]

you will see that Christiana's index number on that day was 106.585 and du Pont's had decreased a little bit to 96.6.

The next significant date in this process—you should keep your eye on column G throughout the next page and column M throughout the next page, and you will see that in Column G as the year—as the month went along Christiana increased from the 106 level to about 115 down at the bottom of the page. Du Pont went somewhat lower

and then itself began to come up so that it was at about 95 at the bottom of the page, corresponding to July 7th.

On July 17th the exact merger terms were announced, namely the 1.123 shares of du Pont for each share of Christiana common. And if you look, Christiana had continued to improve relative to the Dow Jones, and following the announcement of the merger terms increased gradually up to a point so that by the time you get down to the early part of September at the bottom of the page it was at a relative index of 132 and 133.

It is interesting to note in column M what happened to du Pont. Du Pont also seemed to be increasing gradually. There was no significant move on the date the merger terms were announced. But that in early August du Pont went up over a hundred and continued to stay there, and itself seemed to fare better than the Dow Jones Industrial Average.

Q. This was after the terms of the merger had been

[70]

announced.

A. August 7th was about three weeks after the merger terms were announced, yes, sir.

Q. Du Pont was better than Dow Jones during that period?

A. Relative to the base date, yes, sir.

Now, page 5, again keep your eye on these two columns. There was a very significant drop-off in both Christiana and du Pont on September 25th. This coincided with a preliminary announcement by the company that its third-quarter earnings would be flat. This was in an environment where its first two quarters' earnings had been substantially ahead of 1971. So that it is our view that the six-point drop in du Pont that day resulted from that and not from the merger.

Q. Six-point in the price of du Pont, not Christiana.

A. I am sorry. That's correct.

Following the index columns G and M, Christiana seems to be decreasing somewhat, and by the end of—or the early part of November it had been announced that some shareholders wished to participate in hearings relative to the exchange ratio, a number of people began—you can see in the trading volume in October and then toward the end of the year there was a pick-up a little bit in the trading. Christiana's relative index appeared to decrease.

[71]

Du Pont's meanwhile staying reasonably level in the 96, 97, 98 area.

The largest decrease in Christiana's relative index occurring on November 27th probably reflects the fact that that Sunday an article had been published in the New York Times again commenting upon possible difficulties the merger would have. And as you can see, Christiana's relative index fell from 120 to 115 and then proceeded to go down to 102 and has gradually remained at the beginning of the year around 113.

Again the du Pont index—relative index seems to be in the—early on in the 97, 98 area; 92, 93 area, and 96, 97 area at the end of the period.

Q. Now I would like to ask you to direct your attention to the market behavior of du Pont's stock following, first, announcement that a merger with Christiana was under consideration, and then following announcement of the actual terms of the proposed merger. What impact do you see in this record on the price of du Pont stock?

A. Following the announcement that the companies were considering the proposed merger, there does not seem to be any significant effect on the relative index of

du Pont stock versus the Dow Jones. Following the date the terms were announced——

Q. July 17th.

[72]

A. —which was July 17th, about three weeks later than that—well, during that period from July 17th to August 7th when du Pont's relative index exceeded 100, the announcement of the terms, if anything, seemed to have had a positive effect on the performance of du Pont.

Q. That announcement you referred to included not only the terms but agreement in principle to merger, did it not?

A. I believe so, yes, sir.

Q. If buyers envisaged that the merger would have an adverse impact on the value of du Pont stock, would you have expected them to rush in to sell after the merger terms had been announced?

A. Well, I don't—maybe rush is not the right word. Certainly investors anticipate the effect of future events, and certainly if du Pont holders felt that the merger would be injurious to them in the long run, the fact that the merger was announced and not yet effectuated—the fact that it was not yet effective would not cause them to delay disposing of their securities.

Q. Do you see in this performance, either the price or the volumes, any basis for inferring that significant numbers of du Pont shareholders did attempt to sell after the merger terms had been announced?

A. There is no information in this tabulation that

[73]

leads me to that belief.

Q. Looking at it from the Christiana side, what conclusions can you draw from the performance of the Chris-

tiana stock as to the effect of the announcement of the merger terms on that value?

A. I think one can see an increase in the volume of Christiana being traded following, first of all, the announcement that the companies proposed to merge, particularly in the mid-June period, and then specifically after the merger terms were specifically announced toward the end of July. There was a substantial pick-up in Christiana volume. And without having made an exact analysis or a tabulation of the daily average volume, inspection by eye would lead one to believe that the volume of trading of Christiana was on a somewhat higher order following the announcement of the merger terms than it had been previous to that. It is interesting also to note that in October, mid-October, immediately prior to the release appearing in the Wall Street Journal on the request for a hearing there was a pick-up in volume of Christiana. This coincided with an increase in its market price.

There was also an increase in volume of Christiana's common stock this time accompanied by a decrease in its market price, following the New York Times Sunday article in late November. So that one could hypothesize that if

[74]

arbitragers or people anticipating advantage by buying Christiana early on were now of the opinion that the merger might not take place, they were disposing of the positions they had established in Christiana.

Q. Have you examined the prices at which Christiana was selling during this period following July 17th with a view to determining whether a Christiana shareholder could at any time have received by selling his stock the value that he would obtain if the merger with du Pont went through?

A. Yes, sir, we have. That is not contained specifically on this, but I can give you some reference numbers if you would like them.

If prior to the announcement that the companies were considering the merger one looks at the relationship of Christiana's price to the value they would receive, one can say that Christiana say in mid-April—the market price of Christiana represented a discount of about 24 percent from the value they could receive. Following that April announcement there was a steady decrease in that discount number. And following the specific merger terms on July 17th there continued to be a decrease. So that in August and September the discount was in the area of 5 to 5½ percent, and in mid-October had gone down—well, in mid and late October had been as low as 4 percent.

Q. What do you mean when you refer to a discount of

[75]

5 percent and 4 percent?

A. This is the market price per share of Christiana relative to the 1.123 shares of du Pont at its market value, and the difference—Christiana slightly lower than the 1.123 times du Pont. And the measure of that difference is the discount I am speaking of.

Q. Having that in mind, how close could a Christiana shareholder have come to realizing in August and September the values that ultimately would go to him if the merger were to be consummated?

A. As I said, it reached a minimum of 4 percent. He could have come within 4 percent of the underlying value he ultimately would receive.

Q. And do you notice in the figures any significant increase in trading when the values got that close together?

A. Well, when the discount got to as little as 4 percent we did notice an increase in Christiana trading. This occurred in about the third and fourth weeks of October. And that was accompanied, as I said, by an increase in Christiana's market price.

Q. For how long a period could a Christiana shareholder have obtained something close to 94 or 95 percent of the value of the 1.123 shares of du Pont he would have received on consummation of the merger?

A. Well, looking at it the other way, as a discount

[76]

of 5 to 6 percent, the discount got as low as 5 percent in August, early August, and did not exceed 6 percent until the middle of November. So that that would be three plus months, sir, during which the discount was within 5 to 6 percent of his underlying value, or turning it around the way you have said, he could have achieved 94 to 95 percent of what he ultimately might have received had he waited for the merger to go through.

Q. Now, viewing the market activity in Christiana stock during that few months period when the shareholder could have obtained 95, 96 percent of what he would ultimately get if the merger took place, can you draw any conclusions as to whether the body of Christiana shareholders are oriented to profit-taking?

A. I would say, sir, that even though the volume did increase over what it had been before, it was not such a significant amount of trading in Christiana that would lead me to the conclusion that a significant body of Christiana shareholders are so oriented toward profit that they would take advantage of a similar opportunity.

Q. Have you any explanation to offer as to why a greater number of Christiana shareholders did not elect to

buy when the market increase was of the magnitude you have described—to sell. Elect to sell?

A. No, sir. The reasons I think I outlined before.

[77]

A substantial tax cost to them if they sold; the fact that they were continuing to be potentially—if the merger went through they would continue to be in effect du Pont stockholders. Many of them had held the stock for a long time. I would guess that these are the principal reasons, sir.

Q. Have you any views as to whether large stockholders of Christiana might have been expected to sell at this time when the stock was selling at a very small discount?

A. They might not have been able to, sir, in any size, because of the fact that sales by them probably would have had to be subject to a registration statement under the '33 Act.

Q. So is it fair to say that your conclusions would be confined to the smaller body of the Christiana shareholders who were free to sell at any time?

A. That is correct, sir.

Q. Now, earlier in your testimony you referred to services for Christiana that Morgan Stanley has performed in connection with Christiana's tax claim against the United States. Do you recall that testimony?

A. Yes, sir.

Q. What is the nature of the advice and opinions that Morgan Stanley has rendered to Christiana in that matter?

A. We were asked to provide Christiana an estimate of

[78]

the fair market value of the blocks of General Motors stock that they received from du Pont, namely 6,700,000 shares

in 1962, 4,800,000 shares in 1964, and 6,700,000 shares in 1965. Now, the nature of that advice, as I say, was to give them our estimate as to fair market value.

Q. What was the purpose of the ascertainment of fair market value?

A. The company would use that fair market value in substantiating the tax that it had to pay to the government because the receipt of those shares by Christiana was a taxable event.

Q. What did you understand to be the measure of fair market value in the transaction you were examining?

A. A fair market value for that purpose is what a willing buyer would pay a willing seller in cash for that asset.

Q. At some particular time?

A. On a specific day, on the day the distribution took place from du Pont to Christiana.

Q. Did Morgan Stanley assist Christiana in determining what a willing buyer would have paid for these blocks of shares on the days received by Christiana?

A. Yes, sir, it did.

Q. And what was your opinion? What was the ultimate conclusion that you came to in advising Christiana as to the

[79]

fair market value of those three blocks?

A. We advised Christiana that it was our view that these blocks had a value which was less than the aggregate number of shares times the then market price of General Motors stock by varying amounts depending on market conditions at the time and other factors.

Q. What factors did you take into account in determining how much less than market value could be realized by Christiana upon the sale of those shares?

A. Well, in the first place, we concluded that the way to maximize the value of each of those blocks was to have it sold in an underwritten secondary offering to the public; that that was the mechanism that would achieve for Christiana the largest value.

Now, again with the announcement of an offering of the size of the blocks in question on those specific dates and given those market conditions on those three dates, we estimated in each case there would be a market impact. In the first case I believe it was seven and three-quarters percent.

Q. What do you mean by a market impact?

A. That the announcement by itself of an offering of this size in that market would cause the market price to go off, and in the case of the 1962 distribution, seven and three-quarters percent.

To value the block, however, we looked at it from

[80]

Christiana's point of view as to what given that market effect—what then might have to be done to encourage buyers to come in and absorb the block. And in many cases it seemed that an offering price underneath the market has to be made in order to coax buyers in to absorb large blocks of stock. So that to the market impact we added another factor, namely the discount of the public offering price from the market price. And we also added a third factor, namely the underwriting spread or what Christiana would have had to pay an underwriting syndicate to market that block. So that it is these three factors: Market impact, market price discount from—the public offering discount from the then market, and underwriter's spread. And that the total of these three, we told Christiana, we suggested to Christiana, should be deducted from the market price of General Motors in coming up with a fair market value for that block.

Q. On the first block of—you said I think about 6,700,000 shares of General Motors?

A. Yes, sir.

Q. What was the net result of applying these three factors to the market value of the shares?

A. I believe the discount was a total of 14 percent from the then going market of General Motors on that day.

Q. Is it fair to characterize your opinion as being that you advised Christiana that if they attempted to sell

[81]

the 6,700,000 shares on the day of receipt, they would have received net in-pocket for them something like 14 percent less than the market value quoted on the stock exchange that day?

A. That is correct, sir.

Q. Now, in analyzing the merger terms between du Pont and Christiana did you take into account the analyses that you had prepared for Christiana in connection with its tax case?

A. To say we had taken them into account——

Q. You were aware of them.

A. We were aware of them, yes.

Q. Did they have any application to the study of the merger terms?

A. None really. None whatsoever.

Q. Could you explain that, why you feel there is no application?

A. Well, in the first place, the evaluation of GM in the tax case, we had to give our views as to a cash value on a given day for a block of stock that was large and there were difficulties in obtaining that value. In the merger we are dealing on a share-for-share exchange. Du-

Pont is giving out du Pont stock and getting in du Pont stock, in essence. And in our view it is a completely different kind of transaction.

[82]

Q. Mr. Townsend, do you see any inconsistency in the view you expressed in the Christiana tax cases and that you have expressed here as to fair terms in a merger between du Pont and Christiana?

A. No, sir, I don't, for the reasons I have just stated.

Q. In your opinion as an investment banker, do the merger terms that have been agreed upon by the parties here meet the standard of Section 17 of the Investment Company Act as being fair and reasonable and representing no overreaching on the part of anyone?

A. Yes, sir, they do.

Mr. Gribbon: I think that concludes the direct examination on behalf of both of the applicants.

Judge Ullman: Off the record.

(Discussion off the record)

Judge Ullman: On the record.

Mr. Townsend, I am going to excuse you at this time, and of course you will return after lunch for cross-examination.

The Witness: Thank you, sir.

(Witness temporarily excused)

Judge Ullman: Mr. May has indicated that he has about two or three minutes testimony which he would like to give. And if there is no objection, I will allow Mr. May to

[83]

take the stand at this time, and in the event that there is no extended cross-examination—or let me put it in the event there is no cross-examination of Mr. May, he indicates that it will not be necessary for him to continue his appearance. So rather than require Mr. May to withhold his testimony until the normal time at which he will be reached, if there is no objection I will take his testimony at this time, with the understanding that if there is going to be cross-examination, we may defer the cross-examination until an appropriate time.

Is there any objection?

Mr. Gribbon: No objection.

Mr. Broderick: No objection.

Mr. Maher: No objection.

Judge Ullman: All right.

• • •

[89]

• • •

By Mr. Collins:

Q. Was there any fear, was there any thought when you made your appraisal that if you made an appraisal that was against the personal financial well-being of the directors and the officers—chief officers of du Pont and Christiana—was there any fear that you would possibly lose future business coming from du Pont?

A. Absolutely not, sir.

Q. No mention has been made so far, Mr. Townsend, as to any fee that Morgan Stanley will receive for its work

in this merger negotiation. Now, could you give us a rough idea of what the fee of Morgan Stanley will be? Or do you care to answer that?

A. I would be very happy to answer. We have suggested to the companies that our fee be between $200,000 and $250,000.

Q. Mr. Townsend, I am going to ask you some questions, principally in relation to your letter—Morgan Stanley's letter of July 7, 1972, addressed to du Pont and Christiana. So would you please get that letter?

• • •

[91]

• • •

A. My recollection is—and this may not be 100 percent accurate—my recollection is that we employed—as far as tax matters is concerned, we asked for that advice from Davis Polk & Wardwell. On the background as to the 1940 Act we asked both firms.

Q. All right. Now, going to page 4 of your letter, the last paragraph at the bottom of page 4, you say that it is appropriate to consider Christiana's value in terms of the market value of its underlying investments which is the normal way of valuing investment company stock. Now, do you put any qualification on that? Would you say that that is correct regardless of the cost basis of the investment company's assets? In other words, if you were considering an investment company that had two billion dollars worth of assets with a cost basis of $2 billion and the same company if it were in the position of having $2 billion of market assets with a cost basis of, say $200 million, would the same consideration apply?

A. I think from the standpoint of where you start out in valuing the investment company you do start out at the net value of the underlying assets, yes, sir.

• • •

[94]

Q. • • • Now, there you are talking about the possible merger of Christiana with another company other than du Pont. Now, let me ask you, in your opinion, does Christiana control du Pont?

A. I am afraid, sir, I can't have an opinion on that. The companies have disclaimed control for many years.

Q. But you have no opinion?

A. I have no opinion on that.

Q. You have been familiar with du Pont and Christiana for many years—your firm has.

A. Yes, sir.

Q. Have you individually watched Christiana and du Pont?

A. Yes, sir.

Q. But you have no opinion on whether Christiana controls?

Mr. Gribbon: Your Honor, I object. The witness has answered that question to the best of his ability.

Judge Ullman: Overruled. He may respond again.

The Witness: Mr. Collins, let me say that I have no reason to doubt the company's statements that Christiana does not control du Pont.

• • •

[102]

Judge Ullman: Mr. Murtaugh?

Mr. Murtaugh: Yes, I would like to ask some questions.

By Mr. Murtaugh:

Q. The 2½ percent discount from net asset value that is received by du Pont represents a gain of about how much per share for each du Pont share in terms of dollars?

A. Well, $55 million, sir, divided by 47 million shares, so it is something over a dollar a share.

Q. And that is going to produce presumably about 3 cents more income?

A. If the merger is carried out on the proposed basis, looking at du Pont's 1971 earnings there would be an increase of 3 cents a share in du Pont's earnings.

Q. Now, you testified this morning that you thought it would be unfair and unreasonable and over-reaching if a person dealing at arms' length on behalf of—I am putting words into this—persons dealing at arms' length on behalf of du Pont shareholders in a situation where they potentially were presented with an opportunity to get 3 cents per share earnings or a dollar—a little over a dollar in terms of buried value, and the other side to the transaction—and it takes two sides to make a transaction. And the other side to the transaction is getting over a half a billion dollars and getting a better security and getting it tax-free,

[103]

you would think that it would be unfair of a person who can't force a merger to insist on sharing the benefits of that transaction?

A. Sir, again I don't mean to argue, but I don't recall having said exactly what you have said. But looking at it from the standpoint of Christiana—and you I hope will remember that we were advising them in this transaction too—

Q. Yes.

A. —that given the substantial body of precedent it would have been very difficult to advise Christiana that a discount of over 2½ percent was something that the negotiating committee should accept.

Q. You have had a good deal of experience with mergers in general, I presume, and advising people on one side or another of them, have you not?

A. Yes, sir.

Q. Very frequently it happens that the people that think they may have a deal going find that circumstances permit the deal from being acceptable to either side. Isn't that correct?

A. That is correct, sir.

Q. And the merger then falls.

A. That is correct, sir.

[121]

A. ° ° ° Mr. Murtaugh, the earnings for du Pont net income per share was up from 686 to 737 in 1971.

Q. While you are there, what were the earnings for the two preceding years?

A. Why don't I read them all to you. Starting in 1967, the earnings per share were $6.73. In 1968, $7.99. In 1969, $7.62. In 1970, $6.86. And in 1971, $7.33.

Q. Thank you very much.

Now, are you familiar with Vicker's Favorite 50 publication?

A. I am familiar with what it is, yes, sir.

Q. I haven't been able to get my hands on it but the

last time I saw it du Pont wasn't on it. Is it on it now, do you happen to know?

A. I don't know that, sir.

Q. It was on it in 1965, wasn't it, or do you happen to know?

A. I don't recall that, sir.

Q. Is it one of the favorite investments of mutual funds?

A. That would be reflected in Vicker's Favorite 50, because that is a publication that refers to mutual funds, yes, sir.

° ° °

[123]

Q. And while everybody might not agree as to the effect of it, at least something is being added to the total operation by the merger of two companies. Isn't that correct? And ordinary merger?

A. That generally is hoped for, yes, sir.

Q. At least that is the reason that the merger is gone into, isn't that correct?

A. It frequently is a reason, yes, sir.

Q. And take this proposed merger here. Do you see anything very aggressive as far as the industrial progress of du Pont is concerned by this merger?

A. Well, if I understand what you mean by the industrial progress, du Pont is not acquiring other industrial facilities.

Q. Well, it seems to me that we should think in this situation as to what motivates people to approve mergers as a general thing. It is for some sort of a real improvement in their situation; isn't that correct?

A. It is for the advantages that a merger will produce, yes, sir.

BEST COPY AVAILABLE

Q. There are very few mergers that are undertaken to produce an advantage of $1.10 a share or 3 cents in earnings, isn't that correct?

° ° °

[134]

(Whereupon, from 3:22 to 3:35 p.m., a recess was taken.)

Judge Ullman: The hearing will please come to order. Mr. Murtaugh, do you have further questioning?

By Mr. Murtaugh:

Q. Turning to the market value of Christiana shares as it was two weeks before the announcement of the consideration of the merger, I believe you testified it was, what, 27 or 23 percent below the net asset value at that time?

A. The figure I gave this morning, sir, was it was 23 percent below the equivalent value of 1.123 du Pont shares.

Q. Yes. Oh. Not of 1.15?

A. No. The figure that I gave actually was that of the calculation I just mentioned.

Q. Yes, I see.

Now, I don't think it is in one of your studies. Have you observed the studies of your co-advisors here, Kidder, Peabody and First Boston Corporation?

A. Yes, sir, I have read them over.

Q. There is an indication in one of the exhibits of Kidder, Peabody that Christiana Corporation shares were selling in reasonable relation to comparable shares of

closed-end investment companies. Would you agree with that in general?

A. In general, yes, sir.

• • •

[191]

Q. ° ° ° Now, after listening to that statement, kindly, do you think—still, my difficulty is in seeing why you claim it is just an exchange of shares.

A. No, frankly, sir, I don't see why you have difficulty in seeing that point.

Q. I mean even if the market impact is very severe, would that make a difference as to—if it was conceded that the market impact would be severe and prolonged?

A. In the first place, sir, we believe the market impact will not be severe.

Q. But your point would be just as good if it was severe, wouldn't it?

A. That was not—the fact or the possibility of the market impact being severe, if that had to be acknowledged as a fact, as a factor, that would certainly have to be taken into account.

Q. Now, the fact that there is the possibility of a severe market effect in the putting of Christiana into position to gain a 30 percent increase in value wouldn't be a factor to be taken into account, though, would it, in your opinion, apparently?

A. Well, I have to come back and repeat, sir, as I said a moment ago. I think after looking at the factors involved, we have reached a judgment that there is no possibility that there will be a severe market impact.

• • •

[209]

A. ° ° ° We also asked ourselves at what point would the other side to the transaction decide it wasn't worth going through with it. And we came to the conclusion in looking at the other side that after a certain point, if you will, after a certain penalty has been reached, anything beyond that would lead the shareholders of Christiana, and particularly the tax-exempt shareholders, to consider the transaction was too costly to proceed.

Q. So that you reached that conclusion both from advice from lawyers and your own reckoning?

A. Yes, sir.

Q. Now, is it fair to say that in the last two to five years that Christiana has sold at a discount of 20 to 25 percent from its net asset value?

A. Well, I think it has sold at discounts that high. I don't recall exactly over the past five years what the range has been.

Q. Well, over the last two years would you say that it has been fair to say that it sold at a discount of 20 percent?

A. Well, again, as I say, I am not sure of my figures for the last—any period. But let me say to you that I agree with you, Christiana has sold at a discount from its net asset value, and at times as high as 20 percent.

I don't mean—pardon me. I don't mean to be difficult.

[210]

It is just that I am not sure that those ranges are exact or that that number is exact.

Q. Well, would you be safe in saying that it has sold at a discount throughout the last two years, at a 10 percent discount?

A. Well, again I prefer not to quantify it.

I am not sure I have figures here. Let me see if I have figures here which would help me answer your question. If I may suggest, sir, in Exhibit 9 of the exhibit control to our report dated July 7th—if you have that.

Q. Yes.

A. The last column indicates for the period—and these measurements are taken each six months. But commencing with the date December 31, 1967, the discounts have ranged from 15.7 all the way up to a discount on March—well, no, it is the week ending April 7th, if I read this correctly, of 28.3 percent.

Q. As I read this same exhibit, the lowest discount figure, I get the percentage 13.4 percent.

A. Yes, sir. On June 9th. And that followed, of course, the announcement on April 28th that the companies were considering the question of merger.

Q. Absent this proposed merger, do you know of anything that could reasonably lead to the belief that Christiana common stock would sell at any less a discount than

[211]

13.4 percent in the next two to three years?

A. You say absent the proposed merger?

Q. Yes, sir.

A. Well, I hope I am responsive to your question. There have been times when certain events have occurred which have caused Christiana's discount to close right up, to become a very small figure. One such occasion was the General Motors exchange offer where the company offered General Motors at very nearly equivalent to net asset value to Christiana stockholders in an offer to exchange them.

The discount closed up to somewhere in the area of 5 to 8 percent, I believe, at the time of the Hercules exchange offer in 1967. I don't know whether that is responsive to your question.

There have been times, in other words, when this discount has closed up.

Q. Well, in considering that answer, if you will go to page 14 of your letter dated July the 7th to du Pont and Christiana, does the first paragraph on page 14 for all practical purposes eliminate such possibilities as you mentioned?

A. Are you speaking specifically of the third sentence in that paragraph, sir?

Q. I am stating that you said that it would be—that the discount has been lessened when Christiana went to its

[212]

stockholders and said we will exchange Hercules for our stock. Now, those times have been in the past.

A. Correct.

Q. Do you believe that as a practical matter there is any reasonable expectation that Christiana would do such a thing in the next two to three years?

A. No, sir. The tax law was changed I think in 1969 to make this less advantageous. Now, whether or not Christiana notwithstanding would make an exchange, I don't know.

But you are correct, the tax law has changed.

Q. Well, then, getting back to my same question, can you think of any other possibility of an event that would occur in the next two to three years that would—absent this proposed merger that would make Christiana sell at less than the 13.4 discount from net asset value?

A. Well, it is only an assumption. I would assume that it probably would not sell at less than 13.4 percent absent the proposed merger.

° ° °

[216]

° ° °

By Mr. Collins:

Q. As a businessman, forgetting about the legal implications and the legal technicalities of this merger, would it make any difference to you if you were an appraiser making a report on this proposed merger or whether you were merely a stockholder in one of these two companies—would it make any difference to you whether Christiana merges into du Pont and du Pont is the surviving corporation or whether it was reversed and du Pont merged into Christiana and Christiana were the surviving corporation?

A. Well, I haven't thought that whole thing through. I am a bit confused thinking of it turned around.

I really don't know that I can say at this moment off the top of my head whether it would make any difference to me.

Q. Well, can you think a little bit and——

A. Well, specifically what is it that you would like me to comment on?

Q. What I am getting at is this: That under the present terms Christiana is going to merge into du Pont and the Christiana stockholders are proposing to get paid off

[217]

at 97½ percent of their net asset value.

Now, if the situation were reversed, and assuming that legally it could be done, if du Pont were to merge into Christiana, would a stockholder of du Pont having one share with a market value of, say, $160 a share—would you say that he should get $160 of market value of Christiana, would he get that, or would he get a fractional share of Christiana representing, say, 95 percent of a share of Christiana because one share of Christiana is one-plus share of du Pont?

A. Well, sir, again I apologize for not being able to think awfully quickly about this, but it seems to me that whether du Pont merges into Christiana or Christiana merges into du Pont, the substance of the transaction is the same, and that in determining what the proper basis of exchange would be one would start off looking at Christiana's net asset value. And of course, whether du Pont merges into Christiana or Christiana merges into du Pont, the net asset value—the market value of Christiana will approach Christiana's net asset value and the discount will disappear, because it will no longer, in effect, be a holding company; it will be an operating company.

Q. On or about the time of the merger the market value of Christiana was $160 a share. I am trying to find what the market value of common stock of du Pont was at that same

[218]

time. I believe it was roughly $180 per share, making a quick mathematical computation in my head. No, my figures are wrong.

Let's take June 19th. On June 19, 1972, Christiana was quoted at $154 per share and du Pont was quoted at $167.25 per share. Now, if the merger had been arranged so that du Pont was going to be merged into Christiana

with Christiana being the surviving corporation, would you say that the merger terms would be that each common stockholder of du Pont would get something like $167 of market value of Christiana, or would you have said that the common stockholder of du Pont who is going to get Christiana stock should get Christiana stock worth the net asset value of Christiana?

A. Well, if I understand your question, I think I have answered it—maybe not clearly enough.

As I said, I think whether du Pont merges into Christiana or vice versa, the substance of the transaction is the same, and in effect you eliminate a holding company, because the resulting effect, whether it be named Christiana or du Pont, is an operating company. And what market price discount as exists for the holding company will cease to exist, and whatever price—and I don't know what the numbers would be if you announced it that way. Whatever price the Christiana share would be, the market value, if that

[219]

were equivalent to net asset value, there would be a proposed arrangement I would suspect not unlike the one we are talking about today; in fact, exactly similar. And I say that irrespective of the way the merger flows.

Now, as I say, I have only had a few minutes to think about this, but I think if you strip all the directional signs away, I think you will find that the transaction is essentially the same transaction, whether the company ending up is called Christiana or whether it is called du Pont.

[220]

Q. One final question. And at the risk of being repetitious, I asked you this identical question yesterday. In

your personal opinion based on a knowledge of these two companies over a period of years, does Christiana control du Pont?

A. As I think I said, and I hope I can give you an identical answer to the one I gave you yesterday, I have no reason to believe that what the companies say in public is inaccurate.

Mr. Collins: Thank you, sir.

Judge Ullman: Does the Division have questions?

Mr. Osheroff: There is one more participant, Your Honor. Is he going to ask questions?

Judge Ullman: Mr. Maher has indicated he has no questions.

Mr. Anderson: Yes, Your Honor, the Division has some questions.

Judge Ullman: You may proceed.

By Mr. Anderson:

Q. Mr. Townsend, does Morgan Stanley write a lot of reports of this type?

A. Well, sir, we write a number of reports in which we make recommendations as to merger exchange ratios, yes, sir.

° ° °

[224]

Judge Ullman: ° ° ° Please have it marked Division's Exhibit No. 1, and we will mark the letters with a subsequent number.

(Division Exhibit 1 was marked for identification.).

By Mr. Anderson:

Q. Are you familiar with that?

A. Yes, sir, I am familiar with this document.

Q. I would like to look at it also. This is the only copy I have. I am sorry.

A. Yes, sir.

Q. Mr. Townsend, is this the letter containing the written instructions you received from du Pont and Christiana?

A. Yes, sir, it is, sir.

Q. Are these the only written instructions you received?

A. I believe so, sir.

Q. I refer you to page 3 of this exhibit, Division's Exhibit No. 1 for identification, Mr. Townsend.

A. Do you mean, sir, page 3 of the attachment or so-called appendix, Attachment 2?

Q. Yes, that is correct.

[225]

A. Yes, sir.

Q. The first full paragraph which reads "From du Pont's point of view, the most favorable terms of a merger would be those that approach the full amount of the discount."

Do you agree with that statement, Mr. Townsend?

A. Well, I guess—yes, sir. What the memorandum is speaking of there is the market discount of Christiana common stock, and certainly if du Pont could acquire Christiana at that discount it would be favorable.

Q. What do you see as the most significant reasons that du Pont will not be able to acquire Christiana's stock on that basis?

A. I believe we said, sir, that we felt that Christiana would not go along with a proposal of that type. It would be too costly to them.

Q. Is that based on your contact with Christiana or is that based on your anticipation of how the Christiana shareholders would react?

A. Well, as I think we have said, it is based on the fact that in a great many transactions of this type in the past the discount from market value was given very little, if any, weight in the proposed merger terms, and secondly, that as I think I spoke to these gentlemen here this morning, if the Christiana shareholders got less than what they felt to be their underlying interest in du Pont they

[226]

would not be agreeable to going along.

Q. Referring to the last paragraph on the same page, Mr. Townsend, which reads "The report should indicate whether on the assumption that the 30-day liquidation provisions would operate to Christiana's benefit here, du Pont would be justified in giving little weight to the market value of Christiana in the merger negotiations."

Did Morgan Stanley initially proceed on that assumption?

A. Yes, sir. As I think was brought out in direct testimony, we understood—or we assumed that a Section 333 liquidation would be available to Christiana up until the last few days, and in fact until even after the June 30 meeting in Wilmington.

Q. Mr. Townsend, I show you a letter dated June 20, 1972, from Dechert Price and Rhoads, to Messrs. A. Felix and Edward B. du Pont, of 15 pages, and in addition a letter—excuse me. In addition, a letter from the same parties to the same—excuse me, from the same parties, Dechert Price and Rhoads, but this time ad-

dressed to yourself, Mr. Charles C. Townsend, Jr., dated July 8, 1972, of one page, which attaches a letter of July 5, 1972, from Dechert Price and Rhoads, to Messrs. A. Felix du Pont, Jr., and Mr. Edward B. du Pont, of two pages.

Mr. Anderson: I would ask that they be marked

[227]

Division Exhibits 2-A and 2-B, 2-A for the letter of June 20, 1972, and 2-B for the cover letter of July 8 with the attached letter of July 5th.

Judge Ullman: The reporter will please mark them.

(Division Exhibits 2-A and 2-B were marked for identification.)

By Mr. Anderson:

Q. Have you seen these letters before, Mr. Townsend?

A. Yes, sir, I have.

Q. Are these the letters that informed you that in the opinion of Dechert Price and Rhoads the Section 333 tax liquidation would no longer be possible?

A. One of the letters is, sir. The earlier letter attempted to set forth the amount of the tax payable by the stockholders of Christiana in a Section 333 liquidation. That letter—I don't recall that it was signed. Our copy was an unsigned copy. That letter was dated June 20, 1972, and it was that letter which set forth the maximum and minimum tax figures that came out in direct testimony yesterday, approximately $40 million, or actually 38,999,000 for the lower number—and that is page 13—and the figure of 70,120,000, which is on page 14. These figures I believe came out in the direct testimony yesterday.

Q. Is the figure of 70,120,000 an accurate forecast of the amount of taxes that would fall due on Christiana

[228]

or fall due on Christiana's shareholders if a Section 333 liquidation was undertaken?

A. I believe, sir, it is on the shareholders of Christiana, both preferred and common.

Q. I don't remember, Mr. Townsend, if you testified yesterday what—in effect that would be what type of a discount from Christiana's net asset value?

A. Well, I think the higher figure, or 70 million, was equivalent to approximately 2.8 percent of net asset value.

Q. And was that figure later revised? That is, was it later determined that figure could not be relied upon as an accurate maximum amount of tax which would have to be paid?

A. Well, we said, sir, that given the 2.8 percent, we assumed that if Christiana determined to proceed under a Section 333 liquidation it would perhaps achieve a lower tax figure, and thus we looked at a 2 percent maximum discount in the merger exchange ratio at that time as being the maximum which the Christiana shareholders should probably wish to accept.

Following our being informed that the 333 was no longer available, we did not have that 2.8 percent benchmark and we felt that under those circumstances the Christiana shareholders should be willing to agree to a somewhat larger

[229]

discount, namely 2½ percent.

Q. Is it your understanding that at the present time, Mr. Townsend, the reason that Section 333 liquidation cannot be undertaken is that it is not possible to accurately

calculate the amount of tax that would be incurred if such a liquidation was undertaken?

A. I think the problem—and I am not really competent to tell you what the answer is. I think the problem, however, is the inability to determine—certainly it was at the time, inability to determine in the necessary timeframe the amount of earnings and taxes of Christiana upon which the tax would be based.

Q. Do you know if subsequent to that time such calculations have been made?

A. I don't know whether they have or not, sir.

Q. Then it is not your understanding that there is any legal impediment to a Section 333 liquidation, but only that it would possibly cause too high a tax burden on the Christiana shareholders?

A. I don't know—all I can say, sir, is that it wasn't possible within the time span we had available to reach a decision as to what the taxable earnings and profits would be and thus what the tax would be. That does not mean to say that I don't consider it feasible. I really am not competent to judge whether it is feasible.

• • •

[237]

Q. And on page 21 of that report, the middle paragraph, when you write "In light of the foregoing analysis of the proposed merger it appears that Christiana probably would not be justified in accepting a discount, in the form of market value of du Pont common stock, greater than what would be received in a Section 333 liquidation," how do you reconcile your tying of the amount of discount justifiable at this time when you thought a Section 333 liquidation was available to your justifying a discount higher than this when you didn't think a Section 333 alternative was realizable?

A. I think as we explained yesterday, in the light of the possibility of a 333 liquidation wherein the maximum cost would be 2.84 percent and the minimum substantially less than that, we thought that at that time Christiana was justified in not agreeing to a maximum discount for merger purposes larger than 2 percent. When it became apparent that we couldn't quantify, if you will, or could not assume that a Section 333 liquidation were possible, we reconsidered our view and determined that in the light of that Christiana probably should be prepared to agree to an increase in the maximum merger discount and increase from 2 percent to 2½ percent.

Q. How did you determine that the proper amount of increase would be ½ percent?

A. Well, as I tried to say yesterday, sir, this process

[238]

is not one that is possible through use of a calculating machine or a slide rule. It was the combined judgment, however, of the group in the firm on these new circumstances that the 2½% percent was the right number.

[239]

Q. Would you have liked to have known at that time what the tax impact on the Christiana shareholders would have been of a Section 333 liquidation?

A. It certainly would have been important to know that, yes, sir.

Q. What if you had found out that it would be a tax impact of five percent. Would that have influenced your judgment as to whether half a percent more would have been justifiable?

A. We certainly would have had to take it into account. Whether or not our judgment would have changed, I don't know, sir.

Q. Why didn't Morgan Stanley and Company consider this a matter important enough to wait the calculation of the tax impact—wait for the calculation of the tax impact on the Christiana shareholders? That is, isn't this a matter which would have significant impact on the amount of discount you could in good faith represent to the combined boards?

A. Well, I think you have asked me two questions there. First of all, didn't we consider it significant. In answer to that, which was your latter question, we considered that it was an important factor and a helpful benchmark.

As to why did we not wait until the number could be calculated, I don't know that we could have waited until that

• • •

[281]

(Discussion off the record.)

Judge Ullman: You may proceed with your redirect, sir.

RE-DIRECT EXAMINATION.

By Mr. Gribbon:

Q. Mr. Townsend, do you have a copy of the document that has been received in evidence as Division's Exhibit 1?

A. I believe I have, sir, yes.

Q. You did testify that Division's Exhibit 1 was received in the Morgan Stanley offices?

A. Yes, sir.

Q. Would you describe for us the various components of this document.

A. Yes, sir. The first component is the letter dated June 6 in which the special committees of the boards of each company asked Morgan Stanley to advise it with regard to the proposed transaction.

Mr. Gribbon: I might note, Your Honor, that the first two pages are precisely the same thing as Applicants' Joint Exhibit No. 3, simply another copy of it.

By Mr. Gribbon:

Q. What is the next component of Division's Exhibit 1?

A. The next component, sir, is a memorandum dated June 6, 1972, on the last page of which appears Covington and Burling—it is Covington and Burling's memorandum

[282]

entitled "Factors to be Considered in Report of Investment Bankers."

Q. Was that document submitted to Morgan Stanley along with the covering letter here dated June 6 from the negotiators, as part of that?

A. My recollection is they were not. They were dated the same day and received approximately the same time.

Q. You did consider this second attachment here, the Covington-Burling memorandum of June 6, 1972?

A. Yes, sir.

Q. I would like to refer you to page 4 of that exhibit. Would you read the second full paragraph on that page.

A. Commencing, sir, "The distribution?"

Q. Yes.

A. "The distribution of du Pont stock to the shareholders of Christiana may provide an incentive for such shareholders to dispose of their holdings. While affiliates

of Christiana may be restricted in the amount and method of disposition of du Pont stock, a substantial portion of such stock will be freely marketable. Christiana is also considering whether its affiliates may seek registration rights for an underwritten public offering following the merger. The possibility that these factors may have a depressant effect on the market price of du Pont common stock should be considered."

[283]

Q. And was that possibility considered in the analysis that you did?

A. Yes, sir.

[284]

Q. In your direct testimony, or perhaps in cross, you referred to having received some sort of a written request that consideration be given to the possible depressant effect on the market price. Do you recall that? Perhaps this was in answer to Mr. Murtaugh's questions.

A. I think, sir, what I was referring to were the instructions of Covington and Burling asking us to take account of any possible depressant effect on the market price of du Pont, the paragraph I just read.

Q. That was received by you on or about June 6, 1972?

A. Yes, sir.

Q. And when did you render your report?

A. To the negotiating committees?

Q. Yes.

A. The final report, sir, on July 7th.

Mr. Gribbon: I might note for the record, your Honor, that I undertook to give Mr. Murtaugh a copy of the writing wherein Morgan Stanley was requested

to consider the possible effect on the market. This document is that writing, the five—or seven-page second component of Division's Exhibit No. 1.

By Mr. Gribbon:

Q. Would you look at the next component of Division Exhibit 1. What is that?

A. Yes, sir. This is a one-page memorandum to which

[285]

had been attached a schedule. The schedule has been duplicated on two pages, but originally the memorandum was a one-page memorandum prepared by Treasury Division of du Pont dated June 13, 1972, and the title of the memorandum is "Effect of Compliance with Investment Company Act of 1940 on du Pont."

Q. Was that document submitted to you as an attachment or as any part of Applicants' Joint Exhibit No. 3 which was the engagement letter of June 6, 1972?

A. No, sir. It was given us separately by du Pont Company.

Q. Do you recall the approximate date?

A. No, sir, I do not.

Q. Division counsel have introduced as Exhibit 7 a seven-page document that I believe you identified as being notes that you had at the time of the meeting of the negotiators.

A. I did not identify them as such when being cross-examined by Mr. Anderson, no, sir.

Q. What are they? What is Exhibit 7?

A. Exhibit 7, the first two pages of Exhibit 7 are an outline of the procedures that we believed would be followed in pursuing the merger transaction. And this outline was used by me as introductory comment at the meeting of June 30th wherein we gave our view to the

[286]

negotiating committees and their counsel.

Q. Was that document turned over to anybody, to your knowledge?

A. I believe it was not. I believe I used it myself.

Q. I ask you in particular to look at two schedules attached to that Division Exhibit 7. One of them computes realizable value for common stockholders in a Section 333 liquidation. This is not very well paginated. I guess it is page 1 of an attachment. Do you recall that schedule being called to your attention during your cross-examination?

A. Yes, sir.

Q. And the preceding document has another figure for net asset value.

A. Adjusted net asset value, yes, sir.

Q. Did you mean to testify that this earlier schedule showing adjusted net asset value was the amount that the Christiana shareholders would realize at the discount you had recommended?

A. No, sir. This was the adjusted net asset value. The figure that is comparable to the figure on page 12 of our July 7th report. 2,294,000,000.

Q. What comparability is there between that figure of 2-billion-249 and the realizable value shown on the basis of a 333 liquidation in the succeeding schedule?

A. May I turn to another page?

[287]

Q. Yes.

A. I think the last page of this exhibit explains that. The figure for adjusted net asset value for Christiana as a whole of 2,307,000,000 is compared on the last page to the adjusted net asset value of Christiana after a Section 333

liquidation, and the factor that is put back into the 2,220,000,000 figure at the bottom of the page showing Section 333 liquidation, namely the realizable value for common stockholders in such a liquidation—to that number has been added the redemption—aggregate redemption price of the Christiana 7 percent preferred stock of $12,780,000. So that in this constructed figure, adding those two numbers together, one derives a figure of $2,241,000,000, and it is that figure that is related to the 2,307,000,000 as the aggregate adjusted net asset value of Christiana on the earlier page entitled "Merger."

Q. That is the page preceding the 333 liquidation?

A. Yes, sir.

Q. During the course of your examination with respect to the 333 liquidation reference was made to whether the necessary calculation had been made to determine what the cost of a 333 liquidation would be. Do you recall that examination?

A. Yes, sir.

Q. In answering that question did you mean to leave the

[288]

impression that it was simply a matter of putting some numbers together and putting them into a computer to find out what the cost of a 333 liquidation would be?

A. No, sir. I meant to leave the impression, which I believe are the facts, that to determine Christiana's aggregate accumulated earnings and profits requires a complex calculation and a determination of the value of some of the securities Christiana holds; that it is this complexity which has resulted in—that resulted in being unable to compute that figure at that time.

Q. Are you aware that there are in addition to calculation problems legal questions which stand in the way of a precise 333 liquidation?

A. Yes, sir. I have been informed that there are some legal questions, yes, sir.

Q. Were you informed at the time you were advised with respect to the non-feasibility at this time of a 333 liquidation that there were legal questions?

A. If I may refer to the letter of Dechert Price and Rhoads on July 8th, on page 2 of that letter, sir—

Q. Is that July 8th, or is it the attachment which is July 5th?

A. I am sorry. It is the attachment which accompanies the letter of July 8th.

Q. Yes.

[289]

A. The statement is made that a number of legal questions affecting the computation of earnings and profits were discussed.

Q. And would you read on there.

A. And it has become apparent that it will not be possible to agree upon an earnings and profits figure for Christiana. Would you like me to continue, sir? Furthermore, if all the legal questions discussed were resolved against Christiana, the result would be an earnings and profits figure vastly in excess of $85.8 million.

Q. So it isn't a matter simply of making calculations, but there are legal questions to be resolved.

A. That's correct, sir.

Q. I direct your attention for a moment to the discussion you had with Division Counsel about the Delaware-Christiana transaction. What was the net asset value used in that transaction? Net asset value of what stock are we talking about?

A. Well, we talked, sir, about the net asset value of both stocks, Delaware common stock and Christiana common stock.

Q. What was the net asset value—what was the main asset owned by Delaware?

A. Well, the main asset in computing net asset value—the net asset value was computed in terms of the

[290]

underlying shares of du Pont.

Q. Now, again, what was the main asset of Delaware?

A. My recollection is not that current, sir. Whether it was common stock of Christiana—I believe it was.

Q. Common stock of Christiana.

A. Yes, sir.

Q. Christiana's main asset was common stock of du Pont.

A. Yes, sir.

Q. So we had a situation where Delaware's main asset was common stock of Christiana; Christiana's main asset was common stock of du Pont.

A. Correct.

Q. And what stock was used in determining net asset value for the purpose of the merger?

A. The Christiana common stock. The net asset value—the merger—the proposed merger was in terms of Christiana common stock.

Q. Was there a market for Christiana common stock at that time?

A. Yes, there was, sir. And it was—it reflected, I think the report said, discounts of some 15 to 20 percent from the net asset value.

Q. Now, you spoke in your testimony and I think in your report of a possibility of open-ending. What would the effect of open-ending be as far as the Delaware Corporation

[291]

were concerned if it were to open-end?

A. Delaware would receive shares of Christiana and the other assets held by Delaware .

Q. And if Christiana would open-end what would it receive?

A. Christiana would—well, the Christiana shareholders would receive shares of du Pont and Christiana's other assets.

Q. Now, was it possible for Delaware acting alone to obtain in any way stock of the du Pont Company?

A. No, sir. I attempted to state that a little while ago. But that is true. Delaware could not obtain du Pont stock through the Christiana it held unilaterally.

Q. Are you saying that Christiana's cooperation was necessary before Delaware shareholders could receive du Pont stock?

A. Yes, sir. Christiana's cooperation would have been necessary.

Q. And how could that cooperation have been effected? Mechanically what were the possibilities?

A. Well, either that the two companies open-end simultaneously or that they open-end seriatim, or that a merger take place and then Christiana open-end. Some process of that type.

Q. And reflecting again on this so the record will be

[292]

clear, was there any way that you were aware of that Delaware could acting unilaterally have obtained or have given to its shareholders du Pont stock?

A. Not, sir, other than the du Pont it held directly. I believe it held some du Pont directly.

Q. Yes. Do you know whether that was a relatively small amount of the totals?

A. Yes, sir, I believe it was.

Mr. Gribbon: I have no further questions.

Judge Ullman: Is there anything further?

Mr. Anderson: Yes, your Honor, I had one question.

Judge Ullman: Proceed.

RE-CROSS-EXAMINATION.

By Mr. Anderson:

Q. Referring, Mr. Townsend, to the letter of July 5, 1972, which has been marked as Division Exhibit 2-B, looking at the last sentence in the first paragraph on page 2, which reads "Furthermore, if all the legal questions discussed were resolved against Christiana, the result would be an earnings and profits figure vastly in excess of $85.8 million." Do you take from that, Mr. Townsend, that it is impossible to assume all the legal questions against Christiana and then go ahead and make a calculation as to the tax impact on the Christiana shareholders of a Section 333 liquidation?

A. Sir, I don't believe I know the answer to that

• • •

[296]

Judge Ullman: Do you have a witness available, Mr. Gribbon, whom you can start with?

Mr. Gribbon: Yes, I think we do, your Honor. How long did you propose to sit?

Judge Ullman: A half-hour or so.

Mr. Gribbon: The applicant du Pont calls as a witness another Townsend, Edward Townsend.

EDWARD TOWNSEND

was called as a witness and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Gribbon:

Q. Would you please state your name for the Reporter.

A. My name is Edward Townsend.

Q. What is your business address?

A. My business address is 20 Exchange Place, New York City.

Q. And what is your occupation?

[297]

A. I am in investment banking with the First Boston Corporation.

Q. What is your position with First Boston?

A. I am a senior vice president, a director, a member of the executive committee, and president of our Canadian subsidiary, First Boston Canada, Limited.

Q. What is the business of First Boston Corporation?

A. First Boston is a leading publicly-owned investment banking firm offering a broad variety of financial services to issuers and institutional investors. These services include underwriting, distributing, and trading a broad range of investment-grade securities, and rendering financial advice.

We have eight domestic offices. We have offices in London, in Zurich, in Tokyo, and in Montreal.

We are one of the largest new issue houses. We are an important factor in the trading of U. S. Government securities, U. S. Agency securities, all types of money

market instruments, corporate bonds and stocks, and in the underwriting and trading and distribution of municipal securities.

Q. How long, Mr. Townsend, have you been——

A. I was just going to finish, if I may.

Q. Excuse me.

A. Excuse me. I am just going to finish. The

[298]

commercial goes on just a little bit longer.

We are members of the New York Stock Exchange and of the principal regional exchanges. We are engaged broadly in rendering financial advice to corporations and governmental entities involving, in particular, financial planning, the design of particular securities, securities issues, the formulation of merger proposals, and the analysis of the financial aspects of mergers.

Finished, sir.

Q. For how long have you been employed by First Boston?

A. Since 1946.

Q. What was your educational and business experience prior to 1946?

A. I was graduated from Yale University in 1934. I studied abroad, in Paris, the School of Political Science in Paris for a year. From 1935 until 1942 I was with the Central Hanover Bank and Trust Company in New York.

I was commissioned in the United States Army in 1942, and served in the Army in Washington as a staff officer directly reporting to the Chief of Ordnance from 1942 until 1946. At that time I joined the First Boston Corporation.

Q. What has been the scope of your work and responsibilities with First Boston?

A. Throughout my time with the firm I have been in what we call our Underwriting Department; some refer to it as

[299]

Corporate Finance. And I have been in that continuously throughout my service with the firm.

During the late 1940's and early 1950's I participated in the Niagara Hudson Holding Company account divestiture and the United Corporation Holding Company account divestiture.

I have been directly connected with and responsible for a number of mergers involving state or federal approval in the bank and insurance company fields. Among the more important of these have been: The Chemical Bank and its merger with the Corn Exchange Bank and Trust Company and New York Trust Company; the merger of the Hanover Bank and Manufacturers Trust Company; and the United Virginia Bankshares, in the reorganization of that bank holding company.

In the insurance field, mergers, some of the more important ones have been—have involved the CNA Financial Corporation, Chubb Corporation, Connecticut General Life Insurance Company, Crum and Forster, Hartford Fire Insurance Company, Home Insurance Company, Reliance Insurance Company, Springfield Insurance Company, Travelers Insurance Company, United States Fidelity and Guaranty Company.

In the underwriting of new issues I have been closely involved with a number of issues for such issuers as the World Bank, First National City Bank, and the Boeing Company.

In the underwriting of secondary offerings I have been closely involved with stock issues of Ford Motor, Alcan

[300]

Aluminium, M. A. Hanna, KLM Royal Dutch Airlines, and International Harvester, among others.

Q. Did I understand you to say that First Boston is a publicly-owned company?

A. Yes, sir.

Q. Approximately how many shareholders does it have?

A. Approximately 7500.

Q. Does First Boston have any stock interest or any affiliation with either the du Pont Company or Christiana?

A. Quite insignificant stockholdings, and no cross directors or anything of that kind.

Q. Has First Boston ever advised du Pont or Christiana on any occasion previous to the one in which we are now concerned?

A. No, sir.

Q. First Boston was asked to advise du Pont as to the terms upon which a merger with Christiana might be effected; is that true?

A. Yes, sir.

Q. By whom were such requests made?

A. By the negotiating committee appointed by the du Pont board.

Q. Was that request made in writing?

A. Yes, it was.

Q. What did you understand to be the nature of your

[301]

assignment?

A. We were asked to recommend a range of merger exchange ratios that would be fair and reasonable to both companies, both du Pont and Christiana, and the shareholders of those two companies, and that would not involve overreaching.

Mr. Gribbon: I ask that there be marked as du Pont Exhibit 1 a communication dated June 6, 1972, from the Special Committee of the Board of Directors of du Pont to First Boston Corporation.

Judge Ullman: Would the Reporter please read that back to me.

(Record read)

Judge Ullman: Off the record.

(Discussion off the record)

Judge Ullman: Mark du Pont Exhibit 1.

(du Pont Exhibit 1 was marked for identification)

By Mr. Gribbon:

Q. Is du Pont Exhibit 1, Mr. Townsend, the letter from the negotiating committee engaging First Boston in this matter?

A. Yes, it is, Mr. Gribbon.

Mr. Gribbon: I ask that that exhibit be received in evidence.

[302]

Judge Ullman: Any objection? Received.

(du Pont Exhibit No. 1 was received into evidence)

By Mr. Gribbon:

Q. Were you aware, sir, that the terms of the merger would be subject to approval by the Securities and Exchange Commission?

A. Yes, sir, I was.

Q. From whom did you receive that information?

A. Well, I think the letter of appointment spoke of that. Yes. The letter of appointment spoke of a Section 17 proceeding.

Q. What information did you obtain from du Pont in responding to this assignment?

A. They gave us a number of corporate documents and financial reports covering a five-year period for both du Pont and Christiana.

Q. Did you have any consultation with du Pont personnel?

A. Yes, we had a number of meetings with officers of the duPont Company, with the negotiating committee, and with du Pont's counsel.

Q. Were you aware that other investment banking firms were advising on this matter?

A. Yes, sir, we were so advised.

[303]

Q. Did you consult with such other firms in preparing your analysis and recommendation?

A. No, sir. There was no such consultation with the other advisors.

Q. When did you first meet with the other advisors?

A. A meeting was planned by du Pont officers with Mr. Vincent Manno, who had been asked to appraise the newspaper property, and it seemed advisable to du Pont that the three firms meet jointly with Mr. Manno and consider his presentation. That was the first occasion, and really the only occasion until we met in Wilmington on June the 30th that we had any meeting or consultation or conversation of any kind with the other firms.

Q. In connection with the meeting with Mr. Manno, was there any discussion of any matter other than the valuation of the newspaper?

A. No, sir, there was not. As a matter of fact, all the conversation at that meeting was really between Mr. Manno and others in the room rather than among the advisors.

Q. Were you asked to consider the possible advantages and disadvantages to du Pont of a merger?

A. Well, we were given by the du Pont officials the advantages that they saw to a merger with Christiana.

Q. Were you asked to advise them in the first instance

[304]

whether a merger would be advisable?

A. No, we were not, sir.

Q. What did you understand to be the advantages and disadvantages of the merger so far as du Pont was concerned?

A. Well, the principal advantages that they cited to us were the dispersion of the 28-percent block of du Pont stock held by Christiana, and secondly the termination of the affiliation with Christiana under the Investment Company Act of 1940 which had imposed some considerable administrative burden on du Pont in the operation of its day-to-day business.

Q. Did you see any disadvantages to du Pont in the merger?

A. No. We went to some pains to ascertain whether there were any disadvantages, and we didn't discover any. And as a matter of fact, we after careful consideration decided that the two principal advantages that they had cited to us were in fact very real advantages to our way of thinking.

Q. Why did you consider the dispersion of this 28-percent block of stock an advantage to du Pont?

A. Well, it is commonly considered an advantage to have a block of any such size dispersed. We were not

aware of any ill effects of the existence of that block historically, but looking to the future, the future is uncertain, and while we were under the impression it had been a benevolent

[305]

influence over many years, the concentration of that block, things might change, and it seemed farsighted to us on the part of the management of du Pont to take steps which were otherwise not unfavorable to du Pont and would effectuate the dispersion of that block.

Q. Were your recommendations in response to this letter of engagement set forth in written form?

A. Yes, sir. We delivered an opinion letter under date of July 6th, I believe.

Q. And were there exhibits and schedules attached to that letter?

A. Yes, sir. We attached a study, a supporting study.

Mr. Gribbon: I should like to ask that there be marked for identification as du Pont Exhibit 4 a letter from First Boston dated July 6, 1972, to Messrs. McCoy and Shapiro, and as Exhibit 4-A a series of schedules captioned "Study of Proposed Merger of Christiana Securities Company Into E. I. du Pont de Nemours and Company, July 6, 1972."

Judge Ullman: Off the record.

(Discussion off the record)

Judge Ullman: Let the record indicate that the letter of July 6, 1972, and the schedules attached to it have been marked as one exhibit, du Pont Exhibit No. 4 for identification.

[306]

(du Pont Exhibit No. 4 was marked for identification)

By Mr. Gribbon:

Q. Does the document that has been marked as Exhibit 4 constitute the written report and attached schedules that you submitted to the du Pont negotiating Committee?

A. I am sorry, I guess I didn't get that. I thought you were addressing his Honor.

[307]

Q. No. Does the document marked as Exhibit 4 constitute the report and attached schedules that you submitted to the du Pont negotiating committee?

A. Yes, sir, that is correct. Yes.

Q. Had you met with the du Pont negotiating committee prior to the date of the submission of this report of July 6?

A. Yes, sir, we had.

Q. What was the date of that meeting?

A. We met in Wilmington with the committee on June 29th, I believe—yes. The evening of June 29th.

Q. Did you advise the committee orally as to the results of your study?

A. Yes, sir.

Q. Did you after July 6 submit an opinion to the negotiating committee with respect to the fairness and reasonableness of the terms that had been arrived at by the negotiators for du Pont and Christiana?

A. Yes, sir, we did that by letter dated July 7th.

Mr. Gribbon: I ask that there be marked as du Pont Exhibit 4-A, a letter from First Boston dated July 7, 1972, to Messrs. McCoy and Shapiro, a two-page letter.

(du Pont Exhibit 4-A was marked for identification.)

By Mr. Gribbon:

Q. Does du Pont Exhibit 4-A express the opinion of

[308]

First Boston as to the fairness and reasonableness of the terms that had been arrived at by the negotiators?

A. Yes, sir, it does.

Q. What was that opinion?

A. That we were completely in accord with the terms that had been negotiated.

Q. What were the terms that you had recommended to the du Pont negotiators as being fair and reasonable in this proposed merger of du Pont and Christiana?

A. We recommended a range of exchange ratios for Christiana common, a range running from 1.108 shares of du Pont to 1.139 shares of du Pont, as well as a recommendation as to the 7 percent preferred of Christiana with respect to which we recommended a ratio decimal 705, which is the equivalent of $120 per share to those holders of the 7 percent preferred of Christiana.

Q. What was the basis for the recommended exchange ratio that you have just described? How did you arrive——

A. As we studied the proposed transaction, it seemed to us that in essence it was a swapping of du Pont common shares for identical common shares held by Christiana. So what would be involved would be the issuance of shares and the acquisition and retirement of other du Pont shares. So it seemed to us that that was quite a straightforward proposition. And studying beyond that, our central concern

[309]

was that the du Pont Company not suffer any adverse effect from this proposed merger, either in business terms or in financial terms.

Q. And how did you go about concluding that the ratio should be in the range of 1.108 to 1.139?

A. Well, in our insistence with ourselves that there be no possible adverse financial effect on du Pont, and given the fact or opinion that the business advantages to which I have alluded were in a sense imponderables, repsented sound corporate planning from our standpoint on the part of du Pont but difficult to quantify—and as I said, we saw no disadvantages, so our first objective was to make a pro forma calculation that would result in no adverse financial effect on du Pont. And we did that in terms of earnings per share for the common stock of du Pont.

And having reached that point, we thought that that might be quite a fine point that we had worked out with our computers and it might not be all that self-evident to the rest of the world that might be balancing on the head of a pin. So we thought the only way, really, to assure ourselves and the world that there was no adverse financial effect was to build in an affirmative gain for du Pont, which we did in terms of earnings per share. And we thought that would provide a visible, tangible inducement to du Pont common shareholders to take affirmative action in sending in their

[310]

proxies and, when the time came, to approve the merger. And in our judgment, a proper inducement of the nature and character that I have been attempting to describe would be in the range of 8 cents per share to 2 cents per

share increase in the pro forma earnings of du Pont common stock.

And those increases in the pro forma earnings of du Pont common stock—that range of 8 cents to 2 cents relates to the range of merger exchange ratios that I mentioned before of 1.108 and 1.139. The 8 cents goes with the 1.108 and the 2 cents with the 1.139.

That was our approach, sir.

Q. Were you aware, Mr. Townsend, that there were significant benefits flowing to the Christiana shareholders as the result of this merger?

A. Yes. That was sort of immediately apparent as soon as we heard of the proposed transaction.

Q. And in your view was du Pont entitled to share in those benefits that would accrue to the Christiana shareholders?

A. No, we didn't think that was the proper way to look at it, and did not look at it in that light, no, sir.

Q. What is the basis of that view that you have expressed?

A. Well, if I understand your question, and if I may be a little repetitious, we saw the essence of this transaction

[311]

to be an exchange of du Pont common shares for other identical du Pont common shares. To us this was a little like changing ten one-dollar bills for a ten-dollar bill, but somebody has to go to some trouble, and shareholders have to be appealed to in a proxy statement, and their vote is desirable if not indispensable. And in order to induce them to approve the merger we thought that there should be a demonstrable—small, modest, but demonstrable financial gain. In practical terms, a proxy-soliciting organization, for example, must have some material to work with in call-

ing stockholders and urging them to send in their proxies. And earnings per share increase is something that salesmen as well as proxy solicitors understand quite well, and most shareholders do. And that seemed to us a range of reward for taking the trouble.

Q. Well, in view of the benefits flowing to the Christiana shareholders, was it your opinion that nonetheless it would be unfair and unreasonable for du Pont to attempt to exact more than about an 8 cent a share increase in earnings as the price for this merger?

A. Yes, sir.

Q. Why did you feel that the Christiana shareholders should not be called upon to give up more than that?

A. Well, as a practical matter, negotiators have to have credibility. And I think we had to bear a responsibility in making recommendations to the negotiating committee of the

[312]

du Pont Company that would give them that credibility at the negotiating table. And in our judgment it would have been unreasonable for them to propose an offer that went further than the top end of our range, the 8-cent pro forma increase in common earnings.

Q. Were you under the impression that Christiana was under any compulsion to enter into this merger?

A. No. As far as I know they were under no duress of any kind. And they initiated the discussions and apparently asked that the matter be explored, and everybody did explore it conscientiously. But they were quite free to walk away from the transaction if they didn't get acceptable terms to them.

Q. Were you aware of any basis on which Christiana might have put the du Pont shares in the hands of its shareholders other than through a merger?

A. No, sir. Again, if I follow the question—and I have listened to the testimony today—if you are referring to the possibility of a so-called 333 liquidation, we were aware at the early stages that such a possibility was being considered or was available to Christiana, might be available to Christiana. We didn't pay any particular attention to it.

We tried to keep abreast of the calculations which were flying around between ourselves and counsel and all as

[313]

to what we might be able to assume was the liquidating value of Christiana. But to us the only significance it would have had was if it had resulted—or if it might have resulted in more than we were prepared to have du Pont recommend in merger, then du Pont would have been, you know, wasting its time pursuing the merger discussions and we would have said no sense going to any more trouble, call it all off, which is only to say that the merger terms would obviously have to be more attractive than the liquidation terms. But other than that, we didn't pay any particular attention to the liquidation calculations, and learned at the same moment, I guess, as everyone else that the idea was being abandoned anyway for reasons that have been gone into here this afternoon.

Q. Did that alter your view in any way as to the range of terms that would be fair and reasonable?

A. No, sir.

Q. Did you obtain in the course of your examination of this problem legal advice as to the interpretations that had been placed upon Section 17 of the Investment Company Act?

A. Yes, sir. We were supplied by du Pont's counsel with such a memorandum.

Q. And what weight did you give to that advice?

A. Well, with all due respect to learned counsel and to the Commission, we didn't pay much of any attention to it,

[314]

sir.

Q. What do you mean by that?

A. Well, those were different facts, different cases, and we didn't think it worth our while to spin theories as to how they might all be distinguished.

To put it another way, we thought the precedents would have to bend to the facts, not the reverse. And we felt quite capable of coming up with a judgment as to fair terms and, you know, if the precedents didn't fit, that was too bad for the precedents.

It is true, of course, that had we been—had there been too great a variance from our recommendation in what counsel thought the precedents—or interpreted as the precedents for us, I suppose we would have re-examined our approach to see if we found any fault with it and, you know, if we hadn't bridged the thing I suppose we would have told our client, the du Pont Company, that we seem to have come up with something that was quite far from what their counsel thought possible and we would have withdrawn from the case or whatever, or advised du Pont to give up the whole thing; that, you know, the precedents were too silly or harsh or something to fuss with any longer.

Q. Did any such variance between your views as to fairness and reasonableness and what appeared in the precedents come about?

[315]

A. I am sorry. I didn't get that.

Q. You spoke of if there had been a variance between the way you came out—

A. Oh.

Q. Was there such a variance?

A. Well, I guess there was. We just treated it as kind of a fall-out of our figures and at the end of our report we did add a little thing we called an addendum to the report that sort of related our recommendations to this other point of view, working from net asset values. And I guess in that addendum I think we used a slightly different asset value calculation than others. It is kind of a fine point. But our range on that basis was kind of 1½ percent to about 4 percent, I think.

Judge Ullman: I think this is a good point at which we can suspend for the hearing. We will be at recess until 10:00 tomorrow morning.

(Whereupon, at 4:50 p.m., the hearing was recessed, to reconvene the following morning, Wednesday, February 7, 1973, at 10:00 a.m.)

[316]

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

—

File No. 3-3928

—

In the Matter of:
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)
Investment Company Act of 1940

—

Hearing Room 776
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C.

Wednesday, February 6, 1973

Hearing in the above-entitled matter came on for further hearing, pursuant to adjournment, at 10:00 a.m.,

BEFORE:

SIDNEY ULLMAN, Administrative Law Judge.

APPEARANCES:

(As heretofore noted)

[317]

PROCEEDINGS.

Judge Ullman: Mr. Gribbon?

Mr. Gribbon: Yes, sir.

EDWARD TOWNSEND

the witness on the stand at the time of adjournment, resumed the witness stand, and upon examination testified further as follows:

DIRECT EXAMINATION (Resumed).

By Mr. Gribbon:

Q. Mr. Townsend, you recall that yesterday afternoon you testified that your firm's advice to du Pont was that it would be fair and reasonable for the merger to be consummated on a basis that would increase earnings to du Pont shareholders by something in the range of 2 cents to 9 cents a share. Is that correct?

A. Yes, sir.

Q. And that you developed a method to reflect that range of earnings in exchange ratios for du Pont shares for Christiana shares which came out in the range of 1.108 to 1.139.

A. Yes.

Q. Now, would you explain for us the method by which you developed those exchange ratios on the assumption that the earnings of du Pont were to be increased in the range of 2 to 8 cents a share.

[318]

Perhaps you would do that by reference to the report you prepared, which has been previously marked as du Pont Exhibit 4.

A. Yes. If I may pick up the thread of the discussion yesterday, I did refer to our recommended exchange ratios, a range from 1.108 to 1.139, and related that range of merger ratios to pro forma increases in du Pont common earnings in the range of 8 cents to 2 cents. And I might further have related it to a pro forma reduction in dividend

requirement of du Pont ranging from 1-million-9 to $85,000, corresponding to the 8 cents and the 2 cents in the range.

If I may take you through our figures and try to do it as clearly as possible, our starting point was to calculate the earnings that we were protecting. To do this, we took the latest earnings available for common, and those were the earnings for the 12 months ended March 31, 1972. We then divided those earnings, which were 372 millions of dollars, by the number of shares outstanding at May 31, 1972, which were 47,445,810. This produces what might be referred to as a break-even earnings of $7.84.

Q. That is per du Pont share? $7.85 per du Pont share?

A. Per du Pont share. These were not the earnings as reported by du Pont because du Pont used an average number of shares outstanding, and as I pointed out, we used the latest

[319]

figure available to us, the shares outstanding at May 31, 1972.

Our next step was to—well, I should say that we then prospectively increased those earnings in the range of 8 cents to 2 cents, or from $7.92 to $7.86.

Our next step was to adjust the earnings of du Pont on a pro forma basis to reflect the merger.

Q. Is that adjustment shown in one of the schedules in your Exhibit 4?

A. Yes. That is the last page. It is designated 3-A of Schedule 2 of our study.

You will see that the total adjustment in earnings on that schedule is $877,000. That was arrived at by eliminating the dividend paid by du Pont on its 4½-million-dollar preferred stock to Christiana because pro forma there would be no such dividend requirement.

We assumed the sale of the 3-percent interest in the Wilmington Trust. We allowed for a selling cost, and we calculated a capital gains tax on the profit on the sale of that 3-percent holding in Wilmington Trust.

We assumed a sale of the News-Journal property at the appraised value, arrived at by Mr. Manno, and we calculated a capital gains tax on that assumed sale.

We also deducted a million and a half dollars from the cash to be received from Christiana as the estimated

[320]

expenses of merger, and we deducted from that cash an additional million dollars estimated cost of pursuing the federal tax claim.

On the net cash and the assets to be converted into cash, as I have just described, we assumed a 7-percent return before tax and a 3.64 percent return after tax.

So those adjustments resulted in a pro forma earnings available for common of du Pont of $372,877,000.

Q. That would be an increase of $877,000, is that correct?

A. Yes, sir.

So we now have two of the three elements necessary to arrive at our result. We have an adjusted earnings figure, and we have three in our case, in the case of our study—three assumed earnings-per-share figures pro forma for the merger. So dividing one by the other gives us the number of shares for a given earnings level per-share, the number of shares of du Pont to be oustanding. And that figure comes out to be 47 million—excuse me. I am doing this for the middle of our range. It comes out—

Q. Let me ask you, Mr. Townsend, which of your charts are you now referring to in Exhibit 4?

A. Well, it is page 3 of Schedule 3. No, I guess it doesn't have a page number. It is the second page of Schedule 3.

[321]

Q. It is the fold-out?

A. It is the fold-out sheet.

Q. Yes. And I note there are three sets of calculations there, numbered at the top I, II and III.

A. Yes. I just want to take you through one other thing first, if I may, Mr. Gribbon. And then I will relate it to the page you just referred to.

It results in there being on this calculation 47,254,218 shares of du Pont common stock outstanding. From that we subtract the 34,028,690 shares owned by du Pont shareholders other than Christiana. And that leaves 13,225,528 shares available for the Christiana common and preferred holders.

We then subtract the 75,082 shares that under our proposal would be given the 7-percent preferred shareholders of Christiana, leaving 13,150,446 shares of common available for exchange in the merger for the common shares of Christiana, which number 11,710,103. And that division produces an exchange ratio of 1.123.

Q. Do I understand that is 1.123 shares of du Pont for each common share of Christiana?

A. Yes, sir.

Q. Now, under what assumption as to earnings increase have you been talking?

A. Well, that happens to be the mid-point of our range

[322]

of 8 cents and 2 cents. It happens to be five cents. And that will be more apparent, I think, if I take you to that fold-out sheet to which I referred a moment ago. It is a rather complicated page, and there are a good many figures on it. But I would like just to call attention to several of the figures which I think will clarify how we arrived at our recommended range.

If you look down the left column—perhaps I should start differently.

The I, II and III at the top embrace our range—I is a ratio of 1.108, II is a ratio of 1.123, and the third alternative is the other end of our range, 1.139.

Now, if you go down the left column of captions, well down towards the end you will see a caption "Earnings Per Share." It says LTM—that is latest twelve months, to 3/31/72. And if you carry your eye to the right you will see a figure—under a caption a little further up "Before Merger" you will see a figure of $7.84. That is the base figure that we are protecting that I referred to at the outset. If you go then to the right under the II caption in the middle of the page on the same line as the $7.84 that I just referred to you will see a figure of $7.89. That is the base figure with a 5-cent addition, a 5-cent assumed increase in earnings per share. And if you look still to the right of that you will see that that represents an increase——

[323]

pro forma increase in earnings per share of du Pont of .6 percent.

If you then carry your eye up that column under II, you will arrive at the sub-caption "After Merger." Under that caption you will see the aggregate shares to be out-

standing under this alternative. You will see the figures of 34,028,690. Those are the shares for du Pont common shareholders other than Christiana.

The next figure 13,225,528, the shares available for Christiana common and 7-percent preferred. That figure includes 75,082 shares for Christiana 7-percent preferred. And the total to be outstanding of 47,254,218.

Q. Stop on that figure a minute, Mr. Townsend. How did you derive the figure of 47,254,218?

A. Well, that was the division of $7.89 into our estimated pro forma earnings.

Q. Which were——

A. It produces that number of shares.

Q. And you took that as the maximum number of shares of du Pont to be outstanding after merger?

A. Yes, sir.

Now, that—I am sorry this is so complicated. But if you will carry your eye to the left of the 47,254,218 figure, you will find a figure before merger, the aggregate shares of common of du Pont outstanding, 47,445,810. The

[324]

difference between those two figures is 191,592 shares, which is the reduced number of shares of du Pont to be outstanding pro forma for the merger under this plan. That is to say that du Pont will be issuing fewer shares than it acquires and retires.

Now, another effect of that, as I again mentioned earlier, is a reduction in the dividend requirement of du Pont, a cash saving.

If you will look below the figures to which I called your attention, the after merger column, under II, and carry your eye down to a side caption "New Dividend Payout," and you will see some figures there, you will see a figure of 66,128,000, which is the pro forma dividend

requirement to former Christiana shareholders. The figure below that of 67,159,000 is the dividend payout pre-merger to the common shareholders of Christiana and Christiana's holding of $4½ million preferred of du Pont.

So the saving that I referred to is the next figure. It is $1,031,000.

Q. What is that saving?

A. I beg your pardon?

Q. What is that saving?

A. It is a cash saving.

Q. Cash saving in dividend requirements?

A. Yes, sir. And you will see on that line, just to tie

[325]

in the figures I have been referring to—you will see laterally on that line, I have just referred to the 1,031,000. That is in the mid-point of our range. If you will look to the left you will see that if there were to be an 8-cent pro forma increase in per-share earnings of du Pont, the cash dividend—the saving in cash in dividend requirement would be $1,910,000; and to the extreme right, a figure of $85,000. That is on a 2-cent assumed increase in pro forma earnings.

Now, one of the things I said yesterday, and if I may I will repeat, is that we felt strongly that there should be no adverse effect, financial or otherwise, but in this context financial effect on du Pont, and one of the things we had in mind was that there should be no worse than a break-even on the dividend payout requirement.

Q. And your judgment was that the increase in earnings should be within the range of 2 cents to 8 cents a share. Is that correct?

A. Yes, sir, it is.

Q. Now, column II reflects the calculations that support an increase of 5 cents a share. Is that correct?

A. That's correct, sir.

Q. And that results in an exchange ratio as set forth in the top of 1.123?

A. Yes, sir.

[326]

Q. And is that the exchange ratio that ultimately was adopted?

A. Yes. There is a little happenstance involved. The negotiating committees were using slightly different numbers, and prices as of different dates, and it is perhaps happenstance that it comes out to precisely this arithmetic figure that I have here. But it was the mid-point of our range, yes, sir.

Q. Do you recall in the testimony taken yesterday from Mr. Townsend of Morgan Stanley some reference was made to earnings increases of 3 and 4 cents a share?

A. Yes, sir. There can be——

Q. How do you account for——

A. There can be some confusion. The reasons are that—or the reason is that the calculations are all made slightly differently. I think the du Pont Company did use or used figures for 1971 rather than our figure of twelve months to March 31, 1972. I think they did not adjust the earnings as we did on their pro forma calculations. And slight differences in the way the figures were put together. But no substantive differences.

Q. Those differences don't change your basic opinion that the range should be in the area of 2 cents to 8 cents a share?

A. That is my view, yes, sir.

Q. Have you anything further that you feel is

[327]

necessary to clarify this exhibit, Mr. Townsend?

A. No. If you have some further questions, I will be glad to respond to them. But I think I have pointed out the significant items on the page here.

Q. Now, would this increase in du Pont earnings within the range of 2 to 8 cents a share in your opinion be a sharing of the benefits to Christiana that would flow from this merger?

A. No, sir, we didn't think along those lines. And we would have thought it quite inappropriate to think in terms of sharing. As I have attempted to explain, it seemed to us that this transaction might very well be attractive to du Pont Company on a break-even basis. It is our view that the proposed merger is a very constructive proposal, that it makes very good sense all around, and it is very much in the interests of the du Pont Company.

However, it was our judgment that knowing there would have to be a shareholders meeting of du Pont, it seemed to us that it was important to add an element, as I said yesterday, I think, build in a modest but demonstrable gain to the du Pont shareholders so that when you approach them for their proxies a concrete argument could be given to them as to why they should trouble to read the proxy and send in their proxy.

Q. In your opinion do the merger terms as finally

[328]

arrived at, which are within the range of your estimate—are they fair and reasonable to both companies?

A. I believe so, sir, yes. I do believe so.

Q. In your opinion do they represent overreaching on the part of either company?

A. No, they do not in my opinion.

Q. In arriving at your advice to the du Pont Company what assumptions, if any, did you make as to the availability of alternative means by which Christiana might get

its du Pont shares into the hands of the Christiana shareholders?

A. We didn't spend very much time worrying our heads about that. The two parties were proposing to merge and we were honored to be asked by the du Pont Company to advise with them on the terms of the merger. And as I think I mentioned yesterday, had anybody produced a calculation that Christiana could liquidate more advantageously than in our judgment du Pont could—more than du Pont could reasonably pay them, as I think I said yesterday, I would have advised the du Pont Company to, you know, cease all effort and expense over the merger.

On the other hand, I had no reason to suppose that any such attractive liquidation possibilities were available to Christiana.

No, I saw Christiana as a continuing enterprise. It has been on the scene since I guess 1915 and done rather well,

[329]

and they are under no pressure to—as far as I was aware, to liquidate or merge or do anything else. They did think there might be advantages to them in merging with du Pont, and I think there certainly are great attractions to them merging into du Pont. But they could certainly have walked away from the transaction, from the negotiations if they hadn't received a fair proposal from the du Pont side.

Q. You were aware at all times that this transaction had to be subjected to the scrutiny of the Securities and Exchange Commission and meet the tests, the statutory tests of fair, reasonable and not overreaching, were you not?

A. Yes, sir, I was aware of that.

Q. Now, had that not been a requirement and had this been a private transaction in which it was unnecessary to secure any public approval, would your opinion as to the terms or the range of terms that would be fair and reasonable have been any different than those you have expressed here?

A. No, sir, they would not. We saw our responsibility as giving advice to the du Pont negotiating committee, putting them in a position to make a reasonable offer to the Christiana and who had strong credibility in such negotiation. At the same time, quite apart from the statutory requirements, we had to have in mind what might be acceptable to the Christiana negotiators. And as we studied the transaction and our conclusions along these lines, I think had we been

[330]

in the shoes of the Christiana negotiators we might very well have argued for a break-even earnings picture pro forma for the du Pont Company. And then I would have expected the du Pont Company to make the kind of argument we have here, that they needed some modest inducement to their shareholders to approve the transaction. And so whichever side of the negotiating table I had been on I think I would have expected the negotiation to be in this range of 8 cents to 2 cents. It is our way of phrasing the range, or using the range. But substantively in this range of 1.108 shares and 1.139 shares perhaps is a better way to put it. I would have expected both negotiating parties to be negotiating in this range.

Q. Do I understand that that judgment you have just expressed is totally without regard to the statutory requirements? It is based on your experience as a banker?

A. Yes, sir.

Q. In your experience in investment banking, Mr. Townsend, is it common practice for parties to a transaction to share on some sort of an equal basis the total benefits that flow from the transaction?

A. No. No, that wouldn't be the pattern at all. It isn't a question of sharing. It is a question of both being satisfied with given terms. Now, they may be quite disproportionate. One may have a very large gain and the

[331]

other a marked dilution. But that is what makes a market. One fellow won't sell for less and the other one is prepared to make some dilution by reason of the prospects of a greater profit down the road. So there is no sharing. There are views on both sides as to the value of what they are contributing to the proposed merger. And those views are likely to differ, and that is why they have negotiations preceding mergers.

Q. In your examination of this matter at the request of du Pont Company did you consider the possible adverse market impact upon the value of du Pont's stock of the consummation of the merger?

A. Yes, sir. We gave that a great deal of thought, and we discussed it on a number of occasions with the du Pont officers and with the negotiating committee. As a matter of fact, the du Pont Company and its counsel called on us in New York in May to inquire whether we would be interested in accepting the assignment that they outlined to us. And we talked for an hour or two and subsequently lunched together, and on that first occasion there was already discussion of the nature of Christiana holdings and whether there was any information available as to whether there would be intended sales—whether there was anything about the merger that related to facilitating sales

or encouraging sales. And the answer was no, that they were not aware of any intentions

[332]

to sell, and those were repeated to us on a number of occasions, or renewed, or brought up-to-date, sort of. There was no substantive information to change that.

Q. I understand from the outset of your study you were taking into account possible market impact.

A. Yes, sir, that is correct.

Q. Do you recall receiving anything in writing from the du Pont side that advised you or asked you to take that factor into account?

A. Well, I think it may have been the same date as our appointment, or the letter of appointment. We were given an opinion—a memorandum from du Pont's counsel outlining matters that they felt should be considered in our study of the problem. And I recall that among the factors listed to be considered was the possible market impact of the proposed merger.

Q. I would like you to look, Mr. Townsend, at an attachment carrying the caption "Appendix A" to what has been received in evidence as Division's Exhibit 1, the attachment being a memorandum of seven pages signed Covington and Burling, dated June 6, 1972, reading "Factors to be considered in report of investment bankers."

A. Yes, I do remember this, yes. Very well.

Q. Is that a copy of the memorandum that you received?

A. Yes, sir, it is.

[333]

Q. And would you point to the portion of that wherein reference is made to study of possible market impact?

A. Yes. Shall I read it, Mr. Gribbon?

Q. Well, just—you acknowledge that you did receive this memorandum and that it did set forth possible market impact as one of the factors to be considered by you?

A. Very clearly stated here, yes, sir.

Q. What page is that?

A. It is on page four.

Q. I note that the copy of the memorandum that you are looking at contains a number of notes. Are those your notes?

A. No, sir, they are not.

Q. You received a clean copy of this memorandum, did you not?

A. Yes, sir, I did.

Q. Do you recall advising the du Pont negotiating committee with respect to the possible market impact of this transaction?

A. Yes, sir. It was discussed at considerable length at a meeting we had with them on June the 29th.

Q. A meeting with Messrs. McCoy and Shapiro?

A. Yes, sir.

Q. And what was the opinion you arrived at and transmitted to them as to the possible market impact of

[334]

this merger?

A. Well, as we studied the transaction we saw no reason to suppose that there would be any selling of any consequence. And it would only have been in the event that we had been told of intentions to sell that we would have taken them into account.

We reasoned that there weren't to be any more shares outstanding pro forma than before. As a matter of fact under our plan there would be fewer shares. Certainly no change in the investment characteristics of the du Pont stock except again under our plan slightly improved earnings, which would be a favorable thing. There were no tax consequences of the proposed merger, no tax selling. And so we saw no reason to suppose that the merger would result in any abnormal amount of selling, and we so advised the company. But as I said once or twice, this was subject to any information they might have of intended sales, and every time we raised the question they reassured us by saying they knew of no intentions to sell.

Q. Did you make inquiries, or did you receive any information with respect to the basis situation of the Christiana shareholders?

A. Yes. Of course we were generally aware and received supporting material from the company as to the holdings of Christiana. We either knew or were informed that

[335]

the Wilmington Trust had something on the order of a 50-percent interest in Christiana; that other stockholders would account for perhaps another 20 percent; that those holding the 20 percent would tend to be large holders, long-time holders so they would have had—just by reason of the length of their holding they would tend to have low-cost shares. And we of course were aware of the effects of the General Motors shares, the divestiture that resulted in tax consequences of reduction of Christiana tax holding costs materially, $60, $70 a share sort of thing.

Q. Is that a reduction in the Christiana corporation's basis?

A. No. In the shareholders'.

Q. The shareholders.

A. The shareholders of Christiana.

So we of course thought of this—the low tax costs as deterrents to sale and nothing about the merger would

change that. The deterrent to sales inherent in the tax laws would still obtain.

Q. Now let me make clear what you were advising when you inquired about knowledge of plans for significant sales of du Pont stock by former Christiana shareholders.

A. Well, we didn't feel we were in a position to query the Christiana shareholders, directors or officers. The du Pont Company was our client, and they are capably

[336]

advised, and we felt quite safe in relying on their judgment and knowledge and information as to whether there were known intentions to sell.

Q. In your experience as a banker, Mr. Townsend, would it be likely that the mere consummation of this merger and the placing of the shares of du Pont formerly owned by Christiana into the hands of some 7500 or 8,000 individuals and institutions have a market impact?

A. No, I see no reason why it should have.

Q. What is your basis for that opinion?

A. Well, there has been some modest amount of trading over the years in Christiana stock, and that would just be translated into trading in du Pont stock. Presumably there is some more or less constant volume of buying and selling for whatever set of reasons. And the market for du Pont on the New York stock exchange is certainly active and vigorous enough to absorb the sort of equivalent volume of Christiana trading that is taking place in the over-the-counter market.

Q. In forming that view that you have just expressed, did you take into account that the Christiana shareholder would after the merger have du Pont shares that had a market value significantly greater than the value of the Christiana shares he held before?

A. Oh, yes. As of the date of our study and the market prices as of that time, it was apparent that there was

[337]

a market appreciation in the transaction for the Christiana holders. That is a transistory thing and more or less the next day or the next week or the next month. But as of any given moment, there was what one might call a greater unrealized appreciation.

Q. Well, in your opinion, would that market appreciation cause—be likely to cause any significant number of former Christiana shareholders to sell their du Pont stock?

A. No. No. Only as the fortunes of the du Pont Company—or as they saw the fortunes of the du Pont Company might change. That would presumably presuade them to buy more or sell or whatever. But they would be looking at—they would be a stockholder pro forma in the merger, they would be a stockholder of the du Pont Company, and one of a number holding 47 million shares. And all of those holders of 47 million shares follow with more or less diligence the fortunes of du Pont and the price of its stock.

Q. Were you aware in making your study of this matter that it was contemplated that certain of the Christiana shareholders would be given what are called registration rights with respect to the du Pont stock they would receive?

A. Well, I guess there were two issues involved there. I was certainly aware that the large holders of Christiana stock, and I would have assumed also the Wilmington Trust and

[338]

the large holders and directors and all those who could be

related as in control of Christiana, presumably presently hold restricted stock in Christiana and would have restricted stock in du Pont after the merger, and having restricted stock would only be able to sell after registration with this Commission. The related question is the registration rights that they might obtain in their negotiation with the du Pont Company, and I would certainly have assumed that they would ask for certain rights and those would be negotiated out by the people who made the trade. Because it would be a nasty and difficult situation if they had to register but didn't have the rights; that would be quite awkward, and they certainly—they and their counsel would have foreseen that difficulty and met it in the negotiation.

Q. Did the fact that it was contemplated that such registration rights would be contracted for influence your judgment as to whether it was likely that significant sales would take place?

A. Oh, no. I think they are quite unrelated.

The Christiana holder would seek the registration rights quite apart from any intention to sell. He would just want to protect himself for an ultimate sale, or for his estate having to sell or, you know, something down the road. But that wouldn't in itself indicate any intention to sell, no, to seek registration rights, no.

[339]

Q. What significance did you attach to the granting of the registration rights insofar as possible sales of the du Pont stock were concerned?

A. Well, that was a comforting thing. I do not know that I needed the comfort, because I would have assumed that those big holders would sell by way of registered offerings. But this just confirmed that that would be so. And the reason that is comforting or reassuring is that it

means that—or tends to indicate very strongly that the distributions will be made in an orderly fashion, and that those who may at some future time decide to sell will presumably, as I say, do so in an orderly manner and obtain the services of a competent investment banking firm or firms, an underwriting group, to handle the rather complicated transaction of a registered offering.

Q. Has your firm, Mr. Townsend, had experience in the management and distribution of substantial blocks of stock in registered secondaries?

A. Yes, sir, we have been active over many years in this field.

Q. Have you prepared some tabulations setting forth experience, not only your own but perhaps that of other companies, in the handling of registered secondary offerings of large blocks of stock?

A. Yes, sir. I have a tabulation before me that is

[340]

illustrative.

Q. Let me ask before you begin there that there be marked as du Pont Exhibit No. 2 a sheaf of statistical tables captioned "Studies Prepared for E. I. du Pont de Nemours and Company, the First Boston Corporation, January 1973."

(du Pont Exhibit No. 2 was marked for identification)

By Mr. Gribbon:

Q. Have you du Pont Exhibit 2, Mr. Townsend?

A. Yes, I have.

Q. Is that the study of secondary offerings that you have just referred to?

A. Yes, sir.

[341]

Q. Was it prepared under your supervision and direction?

A. It was, yes.

Q. Would you look at the second page there and simply describe for us briefly the content of this exhibit.

A. I might better turn to the third page, if I may. Rather than run you through the index let me just take you through the schedules, if I may.

There are really three schedules here, or perhaps it should be called four. The first is in two pages, and they are secondary offerings of industrial corporations of $75 million or more in 1972. There are two pages, and there are six secondaries tabulated. I will come back, if I may, to that.

The next schedule is also in two pages, and this schedule tabulates the 11 largest secondary offerings by industrial corporations during the period 1956 through 1972. And I might say that this started out to be the 10 largest and then the Gulf Oil Corporation secondary came along in December and we added that and that made 11. But no magic otherwise.

The period covered '56—we went back to '56 to pick up the initial offering of Ford Motor stock, an offering by the Ford Foundation.

The next schedule is entitled "History of Secondary Offerings of Gulf Oil Corporation." And the final

[342]

schedule is entitled "History of Secondary Offerings of Ford Motor Company." That really should say Ford Motor Company stock because they weren't offerings, of course, by the company.

Q. I take it that most of these were offerings by stockholders rather than the company, were they not, if not all?

A. These are all secondary offerings. I don't think we have any even combination offerings on any of these pages.

Q. In other words, these are all dispositions by existing stockholders, where the proceeds are not going to the company.

A. That is correct, sir. Yes.

Q. Let me ask you to refer to the first table of the secondary offerings of industrial corporations in 1972 of over $75 million.

A. Yes.

Q. How many of those were managed by First Boston?

A. There were two, Mr. Gribbon. The Gulf Oil Corporation on the first page and the PPG Industries on the second page.

Q. Looking at the Gulf Oil, would you explain the market quotation tabulation down there?

A. Yes. I will just run you down the—we show the date of the offering, characterize it—the caption to the

[343]

left is a little misleading. It says type of offer, new secondary or combined. And these are only secondaries as indicated under each corporate name. It shows the gross proceeds in thousands, 239 million; it shows that the offering consisted of 9,225,000 shares, which represented 4.4 percent of the shares outstanding at that date of Gulf Oil.

Then market price is the price as of a week before the announcement of the offering, or the filing date where filing and announcement are simultaneous.

The announcement date, which could be a week difference between the first and second. The filing date, the filing that is of the registration statement. The price the day prior to the date of the prospectus, the date of

the offering. The price at the time the price was set, the offering date, and then the price one month after the offering. And then the offering price in relation to the last sale.

And then you will see that we have the Dow-Jones average and the Standard and Poor's stock, 425 stock index. And then the prices corresponding to the captions for Gulf Oil at those dates.

Q. Just looking at that last figure, would it be fair to say that this indicates that before you became active with your $239 million offering the market price was 23⅜?

[344]

A. That is correct, yes, sir.

Q. And you sold it at 26?

A. We did, sir.

Q. And that a month after the transaction was completed the stock was selling at 26⅛?

A. That is correct, sir.

Q. Do you know what portion of the—what the relationship was between the amount of this offering and the trading on Gulf stock?

A. This offer was done in December of 1972, but relating it to the trading volume for the entire year 1972, it represented 24 percent of that volume.

Q. 239 million represented 24 percent of the total trading in Gulf during the year?

A. Well, actually that—yes. Actually I think that is a share—percentage of the shares traded for the year.

Q. At what price-earnings ratio was Gulf Oil selling at the time of this secondary?

A. Between 11 and 12 times; in that range.

Q. Is it selling at that now?

A. Approximately the same, yes.

Q. Do you know what price-earnings ratio is that du Pont sells at?

A. Oh, about 20 or 21.

Q. In your judgment, Mr. Townsend, what was the effect

[345]

of this Gulf Oil offering on 12-5-72 upon the market price of Gulf Oil stock?

A. Well, I think you can see from the tabulation—this is sort of a bird's-eye view of it but we lived with it pretty closely and I think you can see that the market took this offering very well. It was in a time that the Dow-Jones—the stock market generally was doing well, but the offering was very well received, and this doesn't seem to have been any impact on the market at all, any unfavorable impact on the market at all.

Q. Would you refer now to the second page of that first schedule, the PPG Industries secondary. What was the market impact of that offering in your judgment?

A. Well, again I think perhaps I oversimplify a little, but—you can lose yourself in idle speculation about these things, but if you compare the market price a week before the announcement of 46¾, you see that a month after the offering the stock was 47⅛. And yet 9.2 percent of the outstanding shares of PPG were sold in that offering. So there doesn't seem to have been any adverse impact as far as I can tell.

Q. At what price-earnings ratio was PPG selling?

A. Somewhere in the 10 to 12 range.

Q. Mr. Townsend, I ask you on the basis of your study of all of the secondary offerings over 75 million in the

[346]

year 1972, what is to be expected as the market impact of a well-managed secondary offering of a substantial block of stock?

A. Well, two things. The record here shows that the market has taken these offerings listed—taken them in stride and they have been very well digested and no observable adverse impact on the market.

Now, when you leave history and talk prospectively, you don't know at any given time what market conditions are going to be like, but we all live on the assumption that we will have periods of good markets, or stable markets, anyway, and our experience indicates that in reasonably favorable markets and with skillful handling the market can absorb very substantial blocks of securities without any adverse impact on the market.

Q. Would you refer to the last of the schedules in du Pont Exhibit No. 2, that detailing the history of secondary offerings of Gulf—I am sorry, it isn't the last. It is the next to the last schedule, that relating to the Gulf Oil offerings.

A. Yes. We showed—excuse me. Were you about to ask a question?

Q. I want to affirm that your firm has managed each of these Gulf Oil offerings, is that correct?

A. Yes, we have, yes.

[347]

Q. Beginning in 1961 through 1972?

A. Yes, sir.

Q. Who were the sellers of this stock?

A. Well, a number of sellers. Generally they are referred to as the Mellon family, but you know that comprises a lot of entities and trusts and foundations and so on. But they are often loosely referred to as Mellon sales.

Q. Was it commonly known in the market that the Mellon family was embarked on a program of disposing of a portion of its Gulf holdings?

A. Well, I wouldn't call it a program, Mr. Gribbon. The record shows—and as far as I know they have no pro-

gram, but the market is aware that they do from time to time decide to sell various of their holdings for whatever set of reasons that they have. And so the market has been aware of this. Whether or not they were taken by surprise in 1961 I don't recall, but, you know, having done it once, one might imagine they would do it again, and in fact they have done it five more times since then.

Q. What about the total volume of the sales of Gulf Oil Corporation stock as reflected in this exhibit?

A. Well, these six offerings total $621 million; it covers a span of 11 years, and represents in the aggregate 17.6 percent of the stock of the Gulf Oil Corporation. And in a more recent period, if you take the three offerings from

[348]

'67 to '72, they totaled 385 million and represent 12.4 percent of the outstanding stock of Gulf—outstanding shares of Gulf.

Q. In your opinion, Mr. Townsend, what has been the impact on the price of Gulf Oil stock of these six substantial secondaries of Gulf that are set forth in your exhibit?

A. I am not aware they have had any adverse impact, and Gulf Oil rocks along pretty well and people continue to buy and sell it without any particular apprehension about offerings. And we take a certain pride in handling one of these as others do in our industry, and great pains are taken with them. An announcement of an offering—under our system this of necessity comes as a shock to the market because our rules and procedures of this Commission and the New York Stock Exchange don't really allow you to leak this out. You have to keep very tight security on the plans until some given moment and then it is announced. It is inherently, therefore, a surprise to the market. And that precedes the organized pub-

lic efforts of the underwriting group to—and that again of necessity—to organize their selling effort.

The underwriters can't begin until the registration has been filed, and it is quite customary for the announcement of the offering to coincide with the filing. So the news of the sudden increase in supply comes before you have had

[349]

a chance to do anything about the demand. So there is usually some little immediate impact of that, while the market wonders what is going to happen and who is going to be selected to handle it and what confidence they have in the people who are going to handle it. And obviously the task of the underwriting group is to find or create a demand equivalent to the new supply. And that is our business.

Q. Have you been generally successful despite these obstacles in finding the buyers?

A. Yes. Always. Knocking wood a little bit on these things. You have to be lucky as well as smart. And we like to think that luck follows the smart people, but.

Q. What was the Gulf Oil stock selling for when the first of these secondaries occurred?

A. It shows a price of 39½.

Q. And what is it selling for now?

A. Well, I can't quite relate them because there has been a stock split in this period.

Q. What was that stock split? Is it the one in the note indicated, two-for-one split?

A. Yes, there was a two-for-one split in September 1968.

Q. Couldn't one compare the—multiply the 26⅝ which is the last price?

A. I think you may be inferring, and if I may say so

[350]

deferentially, erroneously, that there is any relationship between the price at the outset and the price currently in relation to the secondaries that have been offered. I wouldn't—

Q. Would you explain the error of my ways?

Judge Ullman: Briefly, please.

The Witness: I really would like to withdraw that. I didn't mean to say that, but I—

By Mr. Gribbon:

Q. Would you explain what you have in mind there in saying—put it this way: will you draw what comparison you think can be drawn between the price of Gulf at the beginning of these dispositions and the price now?

A. I would be more comfortable with that question, yes. Thank you.

I think you have to look at these in a very limited time frame; otherwise, you get lost in speculation as to the multiplicity of influences at work here. But I think it is simple and reasonable embracing to say if you look at the price at the time of the announcement and the price let's say a month after the offering, by which time hopefully the distribution has been completed, you will see about what effect there has been.

Now, there can be all sorts of extraneous factors. One of our Ford Motor Company offerings, one of the very

[351]

large ones, we brought it on a Tuesday or a Wednesday and President Kennedy was assassinated on a Friday, and

our closing was scheduled for the following Tuesday. And we had some rather anxious moments. And things on that Friday were so enormously complicated that we couldn't get a phone into the floor of the Stock Exchange, or we had to take quite extraordinary measures to try to cope with the upset conditions in the market. But we closed on time and we presented our check at the closing. But obviously the stock was under considerable pressure.

And so there are all sorts of things affect markets, and one can't generalize too much, but when you know of a desire to sell and well-informed people in this field put their minds to it and painstakingly do what has to be done you do all you can do to insure the success of an offering and hope that market conditions will not change abruptly in mid-course. You still have some flexibility, even in what I call mid-course during your offering period. If things were to be too unsettled you can delay or even withdraw and come back another day.

Q. Have you, Mr. Townsend, at our request considered whether the sale of, say, 5 million shares of du Pont stock in registered secondary offerings over the course of the next five years would, in your judgment, have a significant or lasting market impact?

[352]

A. Well, 5 million shares at the present prices would be something on the order of $800 million to $1 billion, and I would be very confident that that could readily be done in a five-year period, perhaps shorter. I don't think it would certainly take any longer.

You really attack it bit by bit. If anyone had such an intention to sell any such volume of stock, what you do, I think, is—you are well advised to start out with a good-size initial offering, maybe 200 or 300 million, perhaps even larger, and then you would be ready to do it again in—oh,

depending on market conditions you might do it again in six months or you might even want 18 months. It would depend on a lot of factors.

And you wouldn't at the outset decide the size of the subsequent offerings. This would all be in the light of conditions at the time. But I would think three or four, at the most five offerings would take care of a block of that magnitude.

Q. And what, in your opinion, would be the effect of such a series of offerings upon the prices that other non-selling du Pont stockholders might be able to look to for their stock? Leaving aside how much could be realized by the selling stockholders, what impact do you think it would have overall on the market value of du Pont stock?

A. I don't think any particularly. If the managing

[353]

underwriter used good judgment and, you know, didn't arrange for a larger sale than he could handle or the market would accept—a very important consideration is the confidence of the market in those who are handling the distribution. What underwriters do, I don't want to get too much into the technical aspects of it, but once having filed, the underwriters are free to solicit orders for the stock. And that is what we in the trade call building the book. And it requires considerable skill and considerable effort and the time of a great many people and the enthusiasm of a great many salesmen. And as that book builds, it is extraordinary how the Street, as we call it, senses how well that book is doing. And if the book is not building well, the Street will know it, and the stock will be under pressure. If the book is going well and the underwriters are doing their job and conditions are reasonably favorable, the Street will take confidence that the distribution is going to be well handled and without any adverse effect on the price of the stock.

Q. I want to make the record perfectly clear on this. Are you aware of any plans to dispose of any significant amount of du Pont stock following this merger?

A. No. Not at all. On the contrary. I have been assured that there are no such known intentions.

Q. And the answers you have given to me have been purely on a hypothetical or assumption basis?

[354]

A. Yes. Yes. I thought you were just asking me hypothetical questions, if someone decided to sell now not anticipated would that frighten other holders of du Pont shares and therefore depress the price of stock. And I endeavored to assure you that that wouldn't necessarily be true at all, that there would be any adverse impact. As a matter of fact, it can be a very constructive thing for a stock and for the company.

I like to think, and I believe this to be so, that there is a far wider understanding today of the Gulf Oil Corporation and its operations and prospects than there was in October of last year, for example; and not because of the passage of time. It is just because of the enormous effort that went into familiarizing investors really world-wide about the affairs of Gulf Oil. And that is in relation to its industry, and there is a much greater knowledge of Gulf perhaps than there has ever been before. And the entire machinery of our industry was harnessed to the effort to acquaint people with that stock and its merits. And so I would say there is probably a great plus to the other shareholders of Gulf, quite apart from the sellers who remain big holders too. But the other shareholders I think have been benefited by that offering.

Q. The company, would it benefit?

A. Oh, yes. Yes. They like to be well-known and

[355]

understood and appreciated.

Q. It has been implied here in questions that large offerings are feasible only with so-called glamour issues, and presumably that du Pont is not a glamour issue. Do you have any comment on that?

A. Du Pont is not a glamour issue, did you say?

Q. Would you regard it as such?

A. I have the highest admiration for it. I would say it is the bluest of the blue. Now, whether blue is glamorous, I like blue.

Mr. Gribbon: I have no further questions.

Judge Ullman: We will be at recess for ten minutes.

(Whereupon, from 11:10 to 11:25 a.m., a recess was taken.)

Judge Ullman: On the record.

Mr. Gribbon, did you have some exhibits that you wanted to offer in evidence?

Mr. Gribbon: Yes, Your Honor. I would like to offer in evidence the du Pont Exhibit 1, 4, 4-A, and 2, which have previously been identified.

Judge Ullman: I believe 1 has already been received.

Mr. Gribbon: I think that is correct.

Judge Ullman: The others are now being offered.

[356]

Is there any objection? They may be received.

(du Pont Exhibits 2, 4, and 4-A were received in evidence.)

Judge Ullman: Mr. Collins, do you have cross-examination, sir?

Mr. Collins: Yes, Your Honor.

CROSS-EXAMINATION.

By Mr. Collins:

Q. Mr. Townsend, did I understand you to testify that the first contact that your company had from du Pont in connection with this proposed merger was sometime in May of 1972 when their lawyers came up to your firm and discussed the matter?

A. Yes, Mr. Collins. It was late May. The people who came, I can give you later if you like a list of them, but they were officers of the du Pont Company as well as their counsel.

Q. Were you present at this meeting?

A. The first meeting, yes, I was, sir.

Q. Now, at that meeting did you discuss any possible range of valuations as a preliminary estimate on what you thought would be the exchange value?

A. No, we hadn't given the matter any prior thought. The purpose of the call was to discuss with us our availability to serve as an advisor to the du Pont Company,

° ° °

[372]

Q. Well, now, du Pont shares of stock that represent a controlling interest in a corporation, do they have the same value as shares of stock that represent a minority interest in a corporation, in your opinion?

A. Well, I would rather use the words "potential control." And then I think the answer to you is that it de-

pends on a transaction, on a negotiation, on a sale. And there might be different views of the value of the block; it might be worth more or less than the small hundred-share lot. It would depend.

Just prior to the failure of the Penn Central a large block of Penn Central I don't believe would have brought as much perhaps as a hundred shares. On the other hand, if there are people anxious and capable of acquiring controlling interest in a company, they are often willing to pay a substantial premium on that stock.

Q. You heard Mr. Townsend yesterday—Mr. Charles Townsend yesterday testify that in his opinion the value of stock for merger purposes would be different, or could be different from the value of that same stock for federal income tax or federal estate tax purposes. Did you hear him testify to that?

[373]

A. Yes.

Q. Do you agree with his opinion on that?

A. Yes. If I understand his opinion I do agree that there is a great difference in what you are talking about. If you are talking in one instance of a tax-free exchange of shares and on the other hand of the valuation for tax or other purposes of a block of stock assuming it is to be sold—given that assumption, you know the two cases are quite different. Yes, I do agree with him.

Q. Then you would say that the value of stock can have different values depending upon the purpose for which it is being traded, or the circumstances in which it is being sold?

A. Well, I don't think of a merger as a sale. I don't think it is so construed. In a merger one exchanges shares of one company for shares of another or of a new third company.

Q. Now, as a businessman, and forgetting about the legal technicalities and legal aspects of this proposed merger, would you say that this is simply an acquiring or a buying by the du Pont Company of shares of stock of du Pont in exchange for its own shares?

A. Yes.

Q. That it is simply a buying in?

A. Buying might not be the most accurate word.

° ° °

[383]

° ° °

By Mr. Murtaugh:

Q. Let me question your assumption of the net asset value of du Pont shares as being an index of the value of Christiana shares. The net asset value——

A. Excuse me. You lost me already, Mr. Murtaugh.

Q. Excuse me.

A. My concept of net asset value, did you say?

Q. Yes. Net asset value–excuse me. Net asset value of Christiana shares as being an index of its value.

A. Have I said so? I don't think so.

Q. Oh, okay. What is your idea of the value of Christiana shares?

A. What they trade at in the market.

Q. Well, then, we are trading something that is worth, say $140 or something that is worth $160 and we are throwing in–we are giving them $140 and we are throwing in another 25 or so, is that——

A. There is a prospective increase in market value for them from their transaction, yes.

Q. You total that up with half a billion dollars is a fair statement, isn't it?

A. No, I think the testimony yesterday was about $50 million.

° ° °

[401]

Q. ° ° ° Now, as I understood on direct examination, you said that the question came up and counsel advised that you have no reason to think that–they had no information as to there being any particular volume of selling intentions. Is that correct?

A. I think it was officers of the company rather than th ir counsel in that particular question.

Q. What was it was said on that subject?

A. That they were not aware of intentions to sell on the part of Christiana holders if the merger were consummated.

Q. Did they say they made a study of the matter?

A. Well, they are obviously well informed about the nature of those holdings, and had they–had there been–and I assume they made some inquiries.

Q. Well, now wait. If they made inquiries then they were aware of them.

A. Not of intentions to sell. They were aware of what the situation was.

Q. Yes. So they were aware that there wouldn't be any sales if they made inquiries, or that there would.

A. Let's put it this way: they had not unearthed any information with respect to the intention to sell on the part of any Christiana holder.

Q. Did they indicate they had dug?

[402]

A. You said they dug?

Q. Yes. In regard to the inquiries.

A. They made such inquiries as they felt appropriate, I guess.

Q. Then that is a pure guess on your part?

A. As to what they did, yes, it is.

Q. I think you said this morning that if you believed there would be substantial sales that you might have either done one of two things: recommended no merger or raised your price that you thought would be appropriate to counteract the substantial sales that might affect the market. Would that be a fair statement? I mean of the substance of what you said?

A. It might well have altered our view as to the merger terms had we known of intentions to sell in size, yes.

Q. Didn't you think it was discreet to ask that there be some sort of evidence taken as to this?

A. No, not really. Because I think I would have assumed that had they an intention in the near future to make a sale it might well have had to have been disclosed in the proxy material.

Q. In connection with foundations and charitable institutions and trusts for charity, any sale could be executed without tax loss, isn't that correct? Any tax consequences?

• • •

[404]

• • •

Q. Well, as a trustee you have 10 million shares of Christiana and maybe a couple million shares of other assets.

A. If I had 10 million shares of Christiana I would have virtually all of them.

Q. I don't mean 10 million. I mean 100,000, we will say, shares of Christiana. And maybe 10 percent other

assets. You have been holding onto the Christiana because presumably you felt that they don't represent intrinsic value of the shares because of the mark-down from the underlying assets. Would that be a probable reason why trustees might hold onto Christiana shares?

A. Basically they would hold on because they are satisfied with their investment.

Q. They would sacrifice the principle of diversification because of the fact that they were holding du Pont shares underpriced; is that correct?

A. No, no. I haven't said they were underpriced. They sold for what they were, the assets and earnings and dividends and so on that Christiana had, and sold on that basis as a separate stock in the market.

• • •

[407]

• • •

Q. Well, I want to write that down because I want to go into that.

But to pursue this line of thought, would you say that du Pont's Christiana shares were thoroughly—by virtue of the economic circumstances, were thoroughly isolated from the market?

A. Du Pont's Christiana shares?

Q. No, Christiana's du Pont shares. I beg your pardon.

A. Insulated from the market?

Q. Yes.

A. Yes.

Q. And would you say that if they had been on the market the market would be the same, or could you speculate on that?

A. Well, other things being equal it is not going to have any effect at all.

• • •

[443]

By Mr. Anderson:

Q. Yes. Do both documents together, even though they were originally separate documents, list everything you had in your possession when you made your recommendation and report?

A. Well, not necessarily. And I don't think it purports to be a complete list. I think this must embrace most of the basic data, but for example, we had the conference with Mr. Vincent Manno, the appraiser of the newspaper property, and we were in possession of quite a lot of other material. And one of our exhibits here, for example, having to do with secondaries, of course, isn't listed here. So I don't think this was prepared to represent a complete list of everything we—all the material we had or referred to.

Q. Mr. Townsend, I don't believe the record is clear at this time as to the number of meetings you had with the applicants or with the other financial advisors. Do you remember the number and the dates on which they were held?

A. Well, with the other advisors, we met on one occasion. I think it must have been the latter part of June. A meeting with Mr. Manno, the appraiser of the newspaper property. A meeting convened by the du Pont Company officials. All three advisors were represented at that meeting, and I am quite sure du Pont's counsel were represented at that meeting.

• • •

[451]

• • •

Q. What is your present view as to the likelihood of Christiana being able to disappear through liquidation?

A. Well, we understand that currently it is not feasible by reason of tax penalties that it would draw.

Q. Who informed you of that, Mr. Townsend?

A. Well, I think the information actually reached us through du Pont's counsel, but I think probably it originated with the Price-Dechert firm. But I don't recall discussing it directly with Price-Dechert. I think it was with du Pont's counsel.

Q. Looking at No. 5—

A. That would have been on or about June 30th, the time of the general meeting, I think.

Q. Looking at No. 5 in Division Exhibit 10, the last sentence, wherein it is stated "Nor do we see any reason why the du Pont Company, always assuming its interests are properly protected, should not"—excuse me—"should adopt a negotiating position so harsh as in effect to leave Christiana no alternative but to liquidate."

[461]

• • •

Q. I believe you testified earlier, Mr. Townsend, that you believe a 5-cent increase in du Pont's earnings is adequate to get the consent of the du Pont shareholders. Is that correct?

A. I do, sir, yes.

Q. I think you would agree that this benefit to du Pont is not being shared in by Christiana. Is that correct?

A. No. This just flows to du Pont.

Q. And when you talk about the impropriety of du Pont sharing in the benefits to be received by Christiana, by that do you mean benefits that Christiana has but which have cost du Pont nothing in cash outlay or other value transferred to Christiana?

A. Yes. They are so to speak extraneous gains, so to speak, in the Christiana side. They are not at the expense of du Pont in any way and are of principal interest to the Christiana shareholders.

Q. And would you reject the notion that—and the assumption that if du Pont had been able to get a larger discount from Christiana's net asset value, the fact that they didn't pursue that is an opportunity gone and thus an

[462]

opportunity lost to du Pont?

A. I am not sure I follow that question. I do reject the notion that they should have gone beyond our range of 8 cents. I would have considered that an unreasonable negotiating posture that would have reduced the credibility of the du Pont negotiating committee, and that it would have represented overreaching.

Q. Is it your opinion, Mr. Townsend, that the du Pont negotiating committee could not have gotten an agreement on a basis that went beyond 8 cents per share benefit to du Pont?

A. Well, I must assume that the Christiana negotiators are informed, skilled negotiators and that they would have looked at the problem much as we did, and that had an offer been made to them outside of our range, that they would have rejected it.

Q. I believe you testified to the effect this morning, Mr. Townsend, that in a merger—any merger, not necessarily this one, merger partners don't always necessarily share equally in the benefits of the merger. Is that correct?

A. Yes. Actually the consequences that flow from most mergers are disparate in the extreme.

Q. Would you characterize the present merger proposal as one of that type?

A. Well, no, I think this is in some respects a simpler set of facts. The dollar figures are all enormous,

• • •

[474]

(Discussion off the record)

Judge Ullman: On the record.

I will take official notice of the release, and during the evening recess Division Counsel will verify the number of it as an Investment Company Act release since it appears that it is a release under other acts as well as an accounting series release. When we reconvene in the morning we will designate the number of the release of which I have taken official notice.

Again, off the record.

(Discussion off the record)

Judge Ullman: On the record.

RE-DIRECT EXAMINATION.

By Mr. Gribbon:

Q. You were examined by Division Counsel with respect to the possibility of a 333 liquidation of Christiana. Do you recall that?

A. Yes.

Q. At the time, Mr. Townsend, that you advised the du Pont negotiating committee that in your view the range of exchange ratios of something between 1.108 and 1.139 would be fair and reasonable, were you under the notion that a 333 liquidation was still feasible?

A. No. No, we were led to understand that it was not feasible as of our definitive report on July 6th.

[475]

Q. As of your report to the committee at the meeting on June 30th.

A. Oh, June 30th. No. As of that date we had understood it was a possibility.

Q. Right. Now, did the final notice that the 333 liquidation was not a possibility at that time alter your exchange ratio recommendation in any way?

A. No, sir, it did not.

Mr. Gribbon: That is all, your Honor.

Judge Ullman: If there is nothing further, you are excused, Mr. Townsend.

The Witness: Thank you, your Honor.

(Witness excused)

Judge Ullman: We will be in recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:50 p.m., hearing in the above-entitled matter was adjourned, to reconvene on Thursday, February 8, 1973, at 10:00 a.m.)

• • •

[477]

PROCEEDINGS.

Judge Ullman: The hearing will please come to order.

Mr. Anderson has handed to me a copy of the release which we noticed officially yesterday, and the number as he indicated, Investment Company Act Release 5847.

Mr. Gribbon, I believe we are about ready for another witness.

Mr. Gribbon: May I defer to Mr. Broderick.

Judge Ullman: Yes, indeed.

Mr. Broderick: Your Honor, at this point, on behalf of Christiana, we will call Mr. Midgley. Whereupon,

EDWARD MIDGLEY

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Broderick:

Q. Will you please state your name and business address, Mr. Midgley?

A. Edward Midgley, 10 Hanover Square, New York, New York, 10005.

Q. By whom are you employed, Mr. Midgley?

A. Kidder, Peabody and Company.

Q. And what position do you hold with that firm?

[478]

A. I am a vice president, a stockholder, and a director.

Q. How long have you been employed by Kidder, Peabody?

A. Over ten years.

Q. Now, would you briefly describe what position or positions you have held within the firm during that period of time?

A. During that entire period of time I have been active in the corporate finance department of Kidder, and at the present time I am manager of that department.

Q. Would you describe your educational background, please.

A. I graduated from Princeton University in 1958 with a bachelor's degree in economics, and graduated from the Harvard Business School in 1962.

Q. Would you briefly describe the nature of the investment banking functions performed by Kidder, Peabody.

A. Briefly, Kidder, Peabody is a major international investment banking firm that is engaged in the origination and offering of securities in the United States and abroad. We have 35 domestic offices and over 400 salesmen involved in selling securities. We have five offices overseas, in addition to a very active trading operation overseas.

I think possibly the best way to describe our firm is that we are involved in all aspects that are typically

[479]

considered to be parts of the investment banking business with the exception of government securities and commercial paper.

Q. You have indicated that during your employment with Kidder all your time has been spent in the corporate

finance department. Would you describe for us what function or functions are performed in that department.

A. There are four basic categories of functions performed by the corporate finance department of Kidder. The first and the traditional one is the underwriting or public offering of corporate securities. Secondly, we are involved in the private placement of securities for issurers. Thirdly, a great deal of our activity is involved in merger and acquisition work. And fourth is a catch-all category which we consider financial consulting.

Q. And in your capacity as manager of the corporate finance department, do you participate either directly or indirectly in that broad range of activities you have just described?

A. Yes, I do, sir.

Q. Would you explain with respect to your recommendation to Christiana the process by which your firm arrived at that recommendation.

A. Well, it was a very long process. It began in late May when we were asked if we would consider accepting the

[480]

assignment. At that time, after we did agree to accept the assignment, we put together a team, of which I was the head, which principally consisted of three people: Albert H. Gordon, the chairman of our firm and chief executive officer, myself, and an associate, Mike Keehner. At various times we had up to four or five other associates involved in various aspects of finding out what the parameters of the problem that had been presented to us was.

Once we felt we understood the problem, we did a great deal of statistical and analytical work to begin to formulate what the issues or problems in analysis were.

At that point in time we had a major meeting with certain senior members of our corporate finance department who had had many years of experience in similar kinds of transactions, and we reviewed with them the types of assumptions we were making, the scope and extent of our analysis, and indicated the preliminary conclusions that we happened to be reaching.

We also had almost daily contact with Al Gordon through this period and were having the benefit of his thinking and input on our progress.

At various times, when considering certain of the subsidiary issues, we contacted the other departments within our firm that had experience that we deemed to be relevant to the question at hand.

[481]

Q. Mr. Midgley, does Kidder, Peabody or any of its officers have any stock interest in either Christiana or du Pont?

A. The firm does not have any stock interest in either Christiana or du Pont. According to our firm records, there is one Kidder officer who owns 100 shares of Christiana common.

Q. To your knowledge, Mr. Midgley, has any officer of Kidder ever served on the boards of directors of either Christiana or du Pont?

A. No, sir.

Q. Kidder, Peabody was requested by Christiana to assist it and recommend merger terms, was it not?

A. Yes, sir.

Q. Who made that request?

A. The special negotiating committee of the Christiana board of directors.

Mr Broderick: I would ask that this document be marked Christiana Exhibit 1.

(Christiana Exhibit No. 1 was marked for identification)

By Mr. Broderick:

Q. Mr. Midgley, would you identify for the record a one-page document that has been marked Christiana Exhibit 1.

A. This is the letter we received.

[482]

Q. And its date is what, sir?

A. June 6, 1972.

Q. And it is from whom, sir?

A. It is from the special committee of the board of directors of Christiana Securities Company. It is addressed to Kidder, Peabody. And at the bottom it is noted that the assignment discussed therein is accepted by Kidder and signed by our chairman, Mr. Gordon.

Q. Were you aware, Mr. Midgley, that the negotiated terms of this merger would have to be submitted to the Securities and Exchange Commission for their approval?

A. Yes, sir. And we were so informed in this letter.

Q. Did you or your firm review cases involving the interpretation of Section 17 of the Investment Company Act of 1940?

A. Yes, sir. We spent a great deal of time looking at, if I may, Section 17 cases for their assistance in determining what precedents they might be in our analysis, both from the legal point of view in terms of indicating what the Commission had determined in the past was fair and reasonable and not overreaching, but also we were quite concerned with what, if you will, financial precedents there might have been in those other cases, what precedents there might have been in the analysis of the economic factors.

[483]

We were provided by counsel with a memorandum on a number of these Section 17 cases, but we sent one of my associates here in Washington to spend two days to go through the files to try to get the underlying financial advisor's reports in every other instance where they were available. So that we felt that at the time we had rendered our opinion that we had done everything we knew how to do to be aware of every other situation which in any way could be considered comparable, and we had taken note of the positions that people had taken both from the legal, and especially from the financial point of view in those situations.

Q. You say you sent an associate to go through the files. I take it by that you mean the files maintained by the SEC?

A. Yes, sir.

Q. Did you render a report or reports to Christiana containing your recommendation, sir?

A. Yes, sir.

Mr. Broderick: I ask that the large document bearing the date July 7th, to which is attached a number of exhibits, be marked as Christiana Exhibit 2, and the two-page letter dated July 17th be marked as Christiana Exhibit 3.

[484]

(Christiana Exhibits 2 and 3 were marked for identification.)

By Mr. Broderick:

Q. Mr. Midgley, with respect to Christiana Exhibit 2, would you identify that for the record, please?

A. This is a report prepared by Kidder, Peabody dated as of July 7, 1972, which was a report by us to the special committee of the board of Christiana Securities Company concerning a possible merger of that company with the du Pont Company.

Q. Did you participate in the preparation of that report, sir?

A. Yes, sir. I was responsible for it.

Q. Now would you kindly identify for the record Christiana Exhibit 3.

A. Christiana Exhibit 3 a letter from Kidder Peabody signed by our chairman, Mr. Gordon, dated July 17, 1972, addressed to the Board of Directors of Christiana, in which we indicate that we feel—that is the opinion of the firm that the agreed-upon exchange ratio is fair and reasonable to the common and preferred stockholders of Christiana.

Q. In preparing those documents and rendering your recommendations, Mr. Midgley, were your recommendations influenced in any way by any consultations with either

[485]

Morgan Stanley or First Boston?

A. No, sir.

Q. With the exception of your firm's advice to Christiana concerning this particular transaction, has your firm in the past performed any investment banking functions for either Christiana or du Pont?

A. No significant transactions that I am aware of other than participating as an underwriter in certain public distributions of du Pont securities.

Q. With respect to your final recommendation to Christiana concerning a range of ratios which you considered fair and reasonable, would you tell us what that range was?

A. We felt that any offer within the range of plus two percent of net asset value as we defined it to minus three percent of that value—that any deal that was struck within that range would be fair and reasonable to the Christiana holder and would not involve overreaching on the part of either party to the transaction.

Q. And as the testimony has indicated, the agreed-upon exchange ratio fell within your recommended range; is that correct?

A. Yes, sir.

Q. Now, in the course of your analysis and study of this problem did you have any meetings, or did Kidder have

[486]

any meetings with the Christiana special negotiating committee?

A. Yes, sir.

Q. Can you tell us when the first such meeting occurred?

A. The first meeting was on June 13, 1972. Messrs. Gordon, Midgley and Keehner were there representing Kidder, together with our counsel, and the special negotiating committee of Christiana.

At that meeting we outlined to that committee what we had been doing, where we seemed to be coming out. It appeared at that time, although we hadn't reached any—there was still a lot of analysis going on, that it looked like our opinion was going to be that we felt that the answer was net asset value; that although we had been asked specifically in the letter of June 6th to give a range of values, that we felt that the evidence was—that our analysis indicated that net asset value was the best starting point, at least, in the negotiation. And we wanted the committee to be aware early in the process that that might be our position.

Two weeks later, I believe, on June 27th, Mr. Keehner and myself met again with this committee, indicated to them that we had completed our analysis, that it was the firm's opinion that net asset value was the best starting

[487]

point for the negotiation. But we did indicate that we would be prepared to say that certainly any offer falling within the range of plus or minus 1.7 percent would be fair and reasonable and not involve overreaching.

Q. Now, how did you arrive at the figure of plus or minus 1.7 percent at that June 27th meeting?

A. Well, on the minus side we arrived at that because there appeared at that time to be a floor at that point represented by an alternative which has been described as a Section 333 liquidation.

Q. You did attend, I take it, the June 30th meeting at which the other financial advisors were present.

A. Yes, sir.

Q. And at that meeting did you describe or explain the Kidder recommendation to the group?

A. Mr. Gordon and I jointly made that presentation.

Q. And what conclusion or recommendations did you state at the June 30th meeting?

A. Our written report prepared for that meeting took the position that the transaction should be done at net asset value. However, when we were asked what range around that value we could be comfortable with, we expressed orally that we could be comfortable with a plus or minus 1.7-percent range.

Q. Did you subsequent to June 30th meet again with

[488]

the Christiana special negotiating committee?

A. Not by themselves. On July 6th we met with all the outside directors of the Christiana board.

Q. When you say outside directors, do you mean people who are not also directors of du Pont?

A. Yes, sir.

[489]

Q. And what was the purpose of that meeting?

A. The purpose of that meeting was to inform the directors that it was the opinion of the firm that the proposed transaction at a discount of 2½ percent was in our opinion fair and reasonable to the Christiana stockholder and did not involve overreaching on the part of either party.

Q. Would you describe, Mr. Midgley, the advantages or disadvantages of this merger to Christiana?

A. In Exhibit 4 of our report dated July 7th, which I believe is Christiana Exhibit 2.

Q. Christiana Exhibit 2.

A. We summarized in outline form what we perceived to be the principal advantages and disadvantages based, of course, on the assumption at that time of a net asset value exchange with no premium or discount. The principal advantages to Christiana that we saw was, first, that it would enable the Christiana stockholder to realize the underlying value that he already had in terms of the market price of the du Pont shares. In addition, it would result in more current income, more dividend income through the elimination of the Federal tax and certain operating expenses.

Thirdly, the Christiana stockholder would have a much more liquid security from the trading point of view if he were to decide to sell. And that he would now—with the

[490]

du Pont stock he would be able to participate directly in the du Pont Company.

In terms of the disadvantages of the transaction to the Christiana stockholder, we felt that a very important disadvantage was that this what to us was a relatively unique block that represented potential control of the du Pont Company, which in our opinion could probably never be reassembled—that the Christiana stockholder was giving up this unique asset.

Secondly, and this was of concern, we understood, on the part of a number of long-time Christiana holders, that there would be a significant increase in estate tax liabilities resulting from the transaction due to the higher market valuation of the du Pont shares than existed with Christiana shares.

And thirdly, based on the transaction that was finally accepted, it was a disadvantage to the extent of the discount that the Christiana stockholder was giving up the opportunity to later negotiate a better deal or no discount.

Q. Now, with respect to du Pont, Mr. Midgley, will you describe the advantages or disadvantages that you saw?

A. We also thought there were clear, discernible advantages of this transaction to the du Pont Company. That the controlled elimination of this large block was a definite advantage.

[491]

Q. Why is that? You are talking about the controlled dispersion of the 28.3 percent interest?

A. Yes, sir. There were certain other alternatives or certain other courses of action that the Christiana board or stockholders acting alone might have taken at that time or at some future date which could have had an adverse effect on the fortunes of the du Pont Company.

Q. All right. What other advantages, if any, did you discern to the du Pont Company?

A. Well, there was the elimination of the affiliate status under the Investment Company Act of 1940, and there were certain administrative and mechanical problems associated with that that would be eliminated.

We felt a very definite advantage would be that the increased number of shares of du Pont stock that would be in the marketplace would make for an even more liquid market than du Pont enjoyed, and that this could actually have a favorable—or a potentially favorable effect on the market.

And to the extent, of course, that the deal did result in a 2½ percent discount from net asset value, the du Pont stockholder gained a significant, in our opinion—a substantial economic benefit for going into this transaction.

Q. Did you see any significant disadvantages to

[492]

du Pont?

A. No, sir, we did not feel there were any significant disadvantages to du Pont.

Q. In your report, Mr. Midgley, you state that Christiana should be valued on a net asset value basis. Would you explain what you mean by that term? And here I suggest you might want to turn to page 2 of your July 7 report.

A. Well, on page 2 of that—would you like me to read this or——

Q. Just explain it. Or if you feel more comfortable reading it, read it.

A. What we did—and I don't think this is—I think this is just a standard definition of net asset value, was we took all the assets of Christiana and subtracted from those assets any liabilities that Christiana had. Also we subtracted the value of the Christiana preferred at the value that we felt it should be valued at which was the option

redemption value or $120 a share. And then adjusting it for this transaction, we also subtracted one-half of the estimated expenses of this transaction.

In terms of the assets, we did not give any value to the Christiana tax claim because we felt that an alternative method had been developed to give to the Christiana stockholder whatever value was existent in that particular asset.

[493]

Q. Would you explain how you valued the Wilmington News-Journal?

A. We valued, for the purposes of our calculations, the Wilmington Trust Company holding at market value without any discount for blockage or without any recognition of potential capital gains liability.

Q. I had asked you about the Wilmington News-Journal. You told me about the Wilmington Trust Company. My question will be considered to have been modified to have asked you about the Wilmington Trust. Now will you explain how you valued the Wilmington News-Journal?

A. We accepted an independent appraiser's view of the value of that newspaper from which we felt it was appropriate in this case to deduct the capital gains liability that would result from that sale.

We were familiar at the time with the markets of newspaper stocks and valuations, and we felt that the value that the appraiser gave to the paper was reasonable based on this other experience that we had. But it was clearly an acquisition value, the value of this property as an acquisition.

And since the acquisition would result for reasons we understood and the du Pont Company wanting to sell it,

we thought that as long as the Christiana stockholder had the premium involved from the use of the

[494]

acquisition value, that it was appropriate to recognize in this case the capital gains liability that the du Pont Company would recognize when it sold it.

Q. Will you explain, Mr. Midgley, how you arrived at your conclusion that the appropriate valuation method, if you will, was net asset value.

A. Well, this was a long process. When we approach a merger transaction we look at two broad categories of criteria or factors which in our report we have I am afraid glibly called financial and non-financial factors. Non-financial factors would in most mergers be very important to us. We would be concerned about the relative gross of the two firms; we would be concerned about competition, about markets, about research and development, production facilities, a whole raft of business-type of analysis of the two companies.

We concluded in this case, because over 98 percent of the assets of Christiana were in du Pont, that there was really no change in the character of the investment to the Christiana stockholder by shifting from one to the other, and as such, that we did not have to give significant weight to these non-financial factors.

As we shifted to the consideration of financial factors, we first looked at—maybe not first, but earnings and dividends are very important to stockholders. But for

[495]

various accounting and other reasons we did not feel that an analysis of earnings and dividends was helpful in arriving at an exchange ratio in this case.

We looked at book value, and concluded from du Pont's point of view that investors in the du Pont Company have virtually no interest in the book value of du Pont in relation to many other factors, in that the historical cost to Christiana of its assets was just grossly undervalued—the value of the Christiana holding. So we rejected book value as a significant factor to be considered in this transaction.

This left us with market value and net asset value.

Q. In other words, after you had gone through this process, you were left with market value and net asset value?

A. Yes, sir.

Q. As your report indicates, you selected or recommended net asset value? Is that correct?

A. Yes, sir.

Q. Now, would you tell us the specific reasons which led you to that conclusion.

A. There were a number of reasons that led us to the conclusion that the net asset value approach was the appropriate one in this instance. The first reason was that in evaluating closed-end investment companies we typically, and we believe that most financial analysts also, look at net asset value as the principal determinant, or at least

[496]

starting point for determining value.

Second and probably most important to an understanding of our approach to this entire transaction is that we—stripped of certain legal and tax complexities, we viewed this transaction simply as Christiana in a sense liquidating itself and giving what it had and what its stockholders already had to its stockholders. And but for

these legal and tax complications, the assistance to the du Pont Company would not even have been required. But in the real world we did have these legal and tax complexities with which the Christiana stockholder—which he had to face, and therefore, in this transaction it was necessary to enlist the cooperation of the du Pont Company. And we felt that the consideration paid for that cooperation, which has been expressed as $55 million, or to look at it another way, the Christiana stockholders gave back over 166,000 shares of the du Pont stock that they owned plus a newspaper, plus the holdings of the Wilmington Trust. But this conception of what the really economic basis of the transaction was led us very strongly to the position that net asset value was the appropriate criterion for the exchange.

Thirdly, we believe that most, if not all, of the holders of Christiana common and most people who purchased Christiana common perceived of themselves as holding or purchasing the future growth and development of the

[497]

du Pont Company, and as such we thought that was another factor leading us to the net asset value approach.

A fourth reason is that we felt that there were alternative means by which the Christiana stockholder could approximate his net asset value. We mentioned two specific ones in our report: a so-called dividend reinvestment plan, or a merger or acquisition by another party.

Q. Any other factors that led you to this conclusion?

A. Yes, there were. In the whole area of precedent, which we feel is both—again to repeat myself, there are legal and financial precedents. In Christiana's history there were three transactions, each of which seemed to indicate net asset value as the appropriate criterion. These

three were the Delaware Realty merger and the Hercules and GM exchange offers.

Going beyond Christiana's own experience and looking at other comparable situations, we studied approximately 40 cases of investment companies merging with operating companies or with other investment companies under the Section 17 of the 1940 Act. Also some mergers that took place by companies who had exempted themselves from that Act, but where we felt the circumstances were otherwise comparable. And we could find no precedent which in our opinion suggested anything other than net asset value as the appropriate means of exchange.

[498]

Q. You have described the factor or factors which led Kidder to conclude that net asset value was appropriate?

A. Yes. There is one other thing we did. We didn't want to be blind to the fact that someone might consider that market value was the appropriate consideration. And we noted in our report more or less parenthetically that it was our opinion if you had taken the other approach——

Q. When you say market value you are talking about the market value of the Christiana common?

A. Yes, sir. That if you had taken the other approach, that the resultant exchange ratio might very well be at least equivalent to what net asset value indicated, and if anything, might exceed that, on the grounds that typically —and we included in Exhibit G to our letter, premiums are paid to companies in acquisitions, very significant premiums, and we felt, if anything, for a company to acquire control of itself it might be willing to pay even a greater premium than typically. So that although we rejected the market value as the appropriate approach, we didn't conclude that if we had concluded otherwise that we would have ended up with a substantially different answer.

Q. There has been talk, or testimony, I suppose, concerning a liquidation under Section 333. Did the unavailability of a Section 333 liquidation affect your final recommendations concerning the merger terms to

[499]

Christiana?

A. No, sir. Not our final recommendations.

Q. Did it play any part in your initial recommendations?

A. Yes, sir. As I indicated at the June 27th meeting that we had with the special negotiating committee, and also at our June 30 presentation to both negotiating committees, we indicated that certainly a range around net asset value of 1.7 percent was certainly reasonable. The 1.7 percent happened to be the number that was derived by Haskins and Sells and our counsel to be the floor, if you will, that would be provided by a very legitimate alternative, and it seemed that the Christiana stockholder would not accept a deal here that yielded him less than he could turn around and get almost literally the next day through the 333 liquidation.

Q. Now, you say it did play a part in those initial recommendations, but it did not play a part in your final recommendations, and why?

A. Well, we were informed over the weekend after our June 30 meeting that the convenient, if you will, floor that 333 had provided us until that point had become much less firm. And we were therefore forced as a firm to come to an opinion as to what range of variation around net asset value we could conclude would still be fair and reasonable and not involve overreaching. And finance is not an exact

[500]

science. There is no way to say there is only one precise, fair answer. And after a great deal of deliberation within the firm we concluded that a range around net asset value, especially on the discount side, of up to 3 percent would still be within a normal range of variation, of error, but that figure within that range was substantially equivalent to net asset value and that we could conclude and did conclude that it was fair and reasonable and did not involve overreaching.

Q. In the course of Kidder's studies, Mr. Midgley, did you consider the possibility of adverse market impact upon du Pont common stock?

A. Yes, sir, we did. And there is quite a bit of discussion in our report on that subject.

Q. You are referring to page 8 and 9 of your report, are you?

A. Yes, sir.

I think it is obvious that the most important asset the Christiana stockholder has is his du Pont stock. And I think that a Christiana stockholder would share the concern of a du Pont stockholder that anything that would have an adverse impact on the du Pont stock would vitally affect the interests of the Christiana stockholder. And we would not have recommended to Christiana that they do anything that would materially affect their principal holding in an

[501]

adverse way.

If you hypothesize that there would have been a material adverse effect on the market price of du Pont resulting from this transaction, I think our position as advisors to

Christiana would have been that Christiana should have been even better compensated for the deal to take account of that factor.

Q. In the course of your study, though, Mr. Midgley, did you conclude that there would in fact be any adverse effect on the price of du Pont common?

A. We concluded that there would not be a significant adverse effect on the market price of du Pont common, for a number of reasons. First, we were informed by counsel that there would not be any large sales of Christiana. Second, we were aware of the fact that approximately 70 percent, which in my experience is a relatively high number, of the stock would be restricted even after the transaction.

Thirdly, both from our knowledge of Christiana stockholders and the length of time that a lot of them had held their security, and also from looking at the trading activity after the announcement of the exploration of this transaction, that the Christiana stockholder did not seem to be trading-oriented; he was not an in-and-out kind of investor. He appeared to be a long-term investor, and as such that didn't suggest to us that there would be any

[502]

significant selling.

A fourth and compelling reason is that we were aware that based on the distributions that have been made and the market history of Christiana——

Q. When you say the distributions that have been made, what distributions are you referring to?

A. Principally the GM distribution, in terms of reducing the basis substantially that holders at least at that time would have had. That many, the majority of Christiana stockholders clearly would have a significant capital gain

liability if they were to sell. He has held the security, he has perceived of himself as holding du Pont, he holds the du Pont, he has a capital gains liability; why is he going to change his mind because of this change in the form of investment as opposed to the substance.

Furthermore, there are many situations, most mergers, where the acquired company's stockholder has a much greater change in circumstance than the Christiana holder does. If a conglomerate acquires a bread company, there can be a very significant change in the circumstance to the stockholders of the bread company.

Q. When you say circumstance, are you talking about the nature of his investment?

A. The nature of his investment, its potential growth, the relative dividend pay-outs, the relative growth

[503]

rates. And this is despite the fact that he has probably been paid a very handsome premium. But the point is it is our experience that acquiring companies' stocks are not hurt in the after-market, if you will, after the acquisition has been completed, even in these other cases where the change in investment characteristics is much more dramatic than it is in this case.

Furthermore, we have looked at the behavior of the market in du Pont subsequent to the announcement, some of which we obviously were able to do from April 28th to our July 7th report, and other of which we have been able to do subsequent to that until this morning. And we have concluded there is no evidence in the performance of du Pont that would indicate that the market felt that this proposed transaction had adversely affected the attractiveness of an investment in du Pont.

Q. Mr. Midgley, assume that there would be sales of du Pont common, substantial number, in large amounts following the merger if it is approved. Do you think those sales would have a permanent, lasting, adverse effect on the price of du Pont common?

A. No, sir, we do not. The self-interest of the seller I think tends to protect the market from any substantial adverse effect.

A seller or a group of sellers is not going to come

[504]

into the market and disrupt it and drive the price down if it can help it, because that necessarily reduces the proceeds to him. So we have assumed that sellers, if given your hypothesis, if there were to be substantial sellers, that they would approach the market in a sophisticated way and that these distributions would be accomplished using sophisticated investment bankers and would be marketed in a way so that there would not be a lasting adverse effect of any significance, in my opinion, on the price of the du Pont stock.

[505]

Q. Mr. Midgley, in your opinion, are the negotiated terms of the merger fair and reasonable to Christiana and its shareholders?

A. Yes, sir.

Q. In your opinion, Mr. Midgley, do the negotiated terms of the merger involve overreaching on the part of anyone?

A. We do not believe that there is any overreaching involved on the part of anyone.

Mr. Broderick: Your Honor, that concludes Mr. Midgley's direct examination. At this point I would like to move into evidence Christiana's Exhibits 1, 2 and 3.

Judge Ullman: Is there any objection? Received.

(Christiana's Exhibits 1, 2, and 3 were received into evidence.)

Judge Ullman: Mr. Collins, do you have cross-examination, sir?

Mr. Collins: Yes, your Honor.

CROSS-EXAMINATION.

By Mr. Collins:

Q. Mr. Midgley, is the firm of Kidder, Peabody going to receive a fee for its services in preparing a report for this proposed merger?

A. We expect to, sir, yes.

• • •

[508]

• • •

Q. Mr. Midgley, were you here the last three days?

A. It seems like three weeks, but I guess it has been three days.

Q. Do you have a pencil and paper, a piece of scrap paper?

A. I came prepared. I have a pocket calculator.

Q. Good.

As a businessman, and forgetting about the legal implications, do you see any practical difference in an approach to this proposed merger if instead of having Christiana merge into du Pont with the du Pont Company the

surviving corporation—if it were reverse, and the du Pont Company were to merge into Christiana. Do you see any reason for not having such a situation?

A. As I indicated, I have been here for the last three days, and I obviously heard you ask that question before

[509]

and have had an opporunity to consider it. But I almost think you have answered your question by asking it.

If you want me as a businessman to strip this transaction of its form, of its legal form, the transaction is the same regardless of whether A merges into B or B into A or A and B into C. I think the essence of this transaction, economics, are not—or the interests that each party brings to the negotiation of the transaction are not changed by changing the form of the transaction in the way that you are doing. I think the negotiators coming to the bargaining table in your case would come with the same interests and with the same concerns that they did in this case. I really think that the situations are identical. And when I take the 1.123 ratio and take the reciprocal of it, I come very close to that seven-eighths figure that you approximated yesterday.

Q. Well, then, sir, having had the time to do the calculation, assuming that Christiana stock, each share has behind it one and one-seventh share of du Pont common, then do I understand you to say that if the du Pont Company were merged into the Christiana company on a pure net asset value basis, that each du Pont common stockholder would receive seven-eighths of a share of Christiana common. Is that your answer?

A. Yes, sir.

[510]

Q. Now, at the time that the merger was announced, on April the 28th, 1972, I believe that du Pont common

had a range on the stock exchange of 169 high and 167 and three-quarters low, closed at 168¼, and that on the same day Christiana common was quoted at 147 bid and 150 asked according to the Wall Street Journal. So that in round numbers—in round numbers for my example, I would say that du Pont had a value of 168 on that day and that Christiana had a value of 148, and that if the merger went through, that the du Pont stockholder would receive seven-eighths of a share of Christiana, and my arithmetic is that seven-eighths of 148 is about $130.

A. Your arithmetic is good; your logic is not.

What would happen is that given the improbable set of circumstances that you have constructed, if the merger were to be done in reverse, you would have a new company, Christiana, but it would no longer be a holding company; it would now be an operating company. It would really be equivalent to what du Pont will be, given the transaction going the other way. And there would be less—on a pro forma earnings basis there would be fewer shares outstanding of the company, a whole different set of earnings and price-earnings ratios. And on the effective date of the trading of the common stock of the new Christiana, the market patterns, in my judgment, would reflect the same kind of market patterns and

* * *

[514]

Q. Well, now, going back to your first statement, you said that one of the reasons that Christiana was organized was that there was a fear that the Germans were going to take it over. Is that correct?

A. That is part of the folklore that I picked up in connection with the—I believe it is correct. I have no reason to dispute it. But I also cannot—I have been told

that is the situation, but I wasn't—I am afraid to admit it, but I wasn't alive then.

Q. Well, sir, if I told you that Christiana was organized in 1915 and in 1915 there was a world war, that Germany was at war with England and France and that the Royal Navy, the British Royal Navy had a blockade around Germany, and that the newspapers, the American newspapers were full of stories of alleged atrocities by the Germans going into Belgium, would you still say that Christiana was organized to prevent the control of the du Pont Company from falling into the hands of the Germans?

A. I could do no more than repeat what I said before. It is my understanding that that was a motive in the creation of Christiana. It is not central to my argument, however.

Q. Well, getting back to your argument, this possibility

[515]

of alternate merger partners of Christiana. Would you say that perhaps there is a little puffing in that?

A. I think one or two of the other people at the other side of the negotiating table that was representing your interest also took that position. It was our position that given the vast array of factors we considered, that that was one that was worth mentioning.

Q. Now, your second idea is this stock purchase plan?

A. Yes, sir.

Q. And essentially that would mean that the dividend would go to a trustee and the stockholders would tell that trustee to use those dividends to buy up Christiana stock. Is that the essence of it?

A. Yes, sir.

Q. Now, you said that there are two such plans, I believe one of them with the Madison Fund, offhand?

A. Yes, sir.

Q. I forget what the other fund was.

A. It was a closed-end investment company that we offered to the public, Paul Revere.

Q. Paul Revere.

Now, when you mentioned this possibility, were you aware of the nature and the extent of the stockholdings of Christiana?

A. Yes, sir.

[516]

Q. Now, by that I mean—and I hate to throw a lot of numbers at you, but going to an exhibit that I believe that Morgan Stanley prepared, it says that at May 22, 1972, there were 338 Christiana stockholders who owned 1,000 or more shares of Christiana common stock; these stockholders held 11,183,254 shares or 95½ percent of the outstanding stock of Christiana.

Now, given that state of facts, do you believe that the stock ownership of Christiana was similar to the stock ownership of Paul Revere and the Madison Fund?

A. No. They are different, obviously. If the thrust of your question is did we necessarily assume—or were we here—that a Christiana plan of this sort would experience the same identical experience that the other funds had, we are not suggesting that. We just guesstimated 50 percent and said—and this is important, I think—if 50 percent accepted such a plan that that would have the effect every day—every single day, year in and year out, of doubling the volume of Christiana in the market place, all on the buy side. I think you not only have to look and make a guesstimate—and as an alternative Christiana could have tried the plan and seen if there was a response. We will never know until they do what the response would have

been. But it is not only the percentage of the Christiana stockholders that adopt it; you have to relate

[517]

that buying power to the trading—in this case much more limited than the Madison Fund, trading volume that exists in the market. So it was our feeling, yes, probably a number of members of the du Pont family would not be willing to reinvest their dividends, that they wanted those dividends. But it wouldn't take many people, in our opinion, to go along with such a plan to have a significant addition to the buy side of the market on the day by day basis.

I might add that at the time of this report there were only two closed-end investment funds utilizing this device. It is my understanding that just about every fund that has been done since that time has adopted it.

Q. Well, how realistic, in your opinion, is it to talk about 50 percent of the stock ownership? By stock ownership, not shareholders, I mean 50 percent of the shares of Christiana being signed up for such a plan—how realistic is it to expect such?

A. Again, I don't think—and if we did it is a mistake—that we said in the report that it was our opinion that 50 percent would accept the plan. I think what we tried to say, if 50 percent were to accept the plan, that it would have a very dramatic—it would represent a very dramatic addition to the market. I think what you have to understand, these are two specific alternatives that we felt were of interest and helpful to our negotiators in

[518]

this transaction. There are a number of other general kinds of fields that one could have. Tax laws change. Maybe some of the complexities on 333 some day will be ironed out. Any number of things.

I don't think our opinion rests—I know our opinion does not rest on the bedrock of an analysis that says that if there is no alternative it shouldn't be net asset value.

We are just suggesting that there are alternatives that could give a reasonable possibility that the Christiana stockholder could approximate his underlying net asset value. They could split the stock; a number of things.

[519]

Q. But, Mr. Midgley, what I am trying to find and ask you in your opinion, how reasonable is it to expect that either one of these alternatives are practical?

A. I think it is reasonable to conclude that there is a possibility that some of these alternatives might assist Christiana in reducing or possibly eliminating the discount from net asset value without this transaction that we are presently considering. That is all we have said, and that is all we intended to say.

Q. I am not an expert on the stock market, anywhere near that, but if this stock purchase plan were adopted and it started going, it would tend to buy up the so-called floating supply of Christiana common?

A. It would tend to transfer the ownership of Christiana common from certain stockholders who came into the market to sell it to certain other existing stockholders who had expressed a desire to increase their participation in Christiana. Yes.

Q. Is my question inaccurate? Would it tend to dry up the floating supply, the market supply of Christiana common? I may not be using the right term, but do you understand what I am saying?

A. You certainly would be putting—I would agree with the presumption that the buyer of that stock would be a long-term—a presumption that he is a long-term holder

[520]

is a reasonable one, and that that stock will not quickly be coming back to the market.

Q. I wish I had a better knowledge of stock market terminology, because you don't seem to answer my question yes or no.

A. Well—

Q. Can you answer it yes or no?

A. Yes.

Q. It would tend to dry up the floating supply, the market supply?

A. Yes, to a minor extent.

Q. To a minor extent?

A. Well, I have to make an assumption that if the trustee buys the stock for the plan—if he didn't buy it someone else would. And I have to measure, to answer your question, something I really can't measure, and that is what the relative likelihood of that other buyer selling before the trustee's buyer, and I don't know.

Q. Well, what I was trying to state was that—and ask you. Put it this way: I was trying to ask you if this plan went into effect and over a period of time, say a year, a year and a half, the trustee every dividend day would buy up Christiana stock, what would then be the effect after, say, a year's operation of this plan if somebody put a large amount of Christiana on the market as opposed—put 10,000

[521]

shares, to be specific—put 10,000 shares on the market a year and a half in the future as opposed to if this stock purchase plan had not been in existence. Would there be any difference?

The Witness: Would you mind repeating that?

(The question was read back.)

The Witness: Let me try to answer what I think to be your question. I think you are concerned that over a period of time a program like this might dry up the liquidity of the market. Taking that to its interesting logical extreme, ten years from now all the buying power, all the liquid supply has been absorbed by the trustee on behalf of the people he was acting for. And a ten-thousand-share—and it had been that way for five years. And a ten-thousand-share block, the last remaining block, came into the market to be sold. The instructions the trustee has are—and he now has built up five years of dividends that he hasn't been able to put in the market that he has wanted to put in the market—that he would buy that up to net asset value. And I would guess that that block, if the trader of that 10,000 block knew what he was doing he could get from the trustee net asset value for it; that is his offer, or a penny under. I think the trustee would have to buy it.

So I don't want to be as dramatic as you, that

[522]

it would dry up the supply, but to the extent that it does it has exactly the effect we were hoping it would have, of reducing and eventually eliminating at the extreme the discount. So if your concern about the liquidity is correct, it is because our plan is working, I believe.

Q. If the stock purchase plan were adopted, you state that it would decrease the liquidity to an extent of the over-the-counter market of Christiana?

A. If the plan were adopted and a significant amount of the Christiana stockholders accepted the offer—

Q. Yes, sir.

A. Over a long period of time that could have the effect of reducing the liquidity of the Christiana market, yes. I believe so.

Q. Now, if it did reduce the liquidity of the Christiana market, would that be against the interests of the large stockholders of Christiana?

A. No, except in one respect. To the extent it is reducing the liquidity, it is my opinion it is also reducing the discount. So for most Christiana stockholders that is an advantage.

I think the only Christiana stockholder that would consider it a disadvantage is one who felt that he was near death and that his estate might have a higher valuation on the shares through the operation of this plan than it would

• • •

[542]

AFTERNOON SESSION.

(1:45 p.m.)

Judge Ullman: The hearing will please come to order.

Mr. Broderick, you wanted to call a witness, I believe?

Mr. Broderick: I think that Mr. Smith will call Mr. Harter.

Judge Ullman: Oh, Mr. Smith. All right, sir.

Mr. Smith: Yes. I would like to call Mr. Raymond Harter.

RAYMOND J. HARTER

took the stand, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Smith:

Q. Will you state your name and business address, please?

A. My name is Raymond J. Harter. I am a vice president in the trust division of Manufacturers Hanover Trust Company, 350 Park Avenue, New York City. I am in charge of the special assets department of the bank, and in that capacity I am responsible for securities of closely held corporations.

Q. Mr. Harter, would you describe your educational background and your employment experience with the bank?

A. I have a bachelor of science degree in economics

[543]

from Villanova in 1934, and a master of business administration from Harvard Business School in 1938. I came with the Manufacturers Hanover Trust Company in 1941, then the Central Hanover Bank and Trust Company. And I have been an investment analyst with them ever since.

For the period 1953 to 1961 I was a senior chemical industry analyst, and from 1961 to 1971 I was a senior industrial analyst.

Since 1971 I have been the head of the special assets department.

Mr. Murtaugh: Special what department?

The Witness: Special assets department.

I have been since 1955 a member of the officers' investment committee, which is the investment policy-making committee for the trust department.

Since 1952 I have been a member of the New York Society of Security Analysts. I am a chartered

financial analyst, and have been since that institute chartered its first class in 1963.

By Mr. Smith:

Q. Mr. Harter, approximately what is the market value of the securities which the bank holds in trust?

A. About $10 billion of securities for which we have investment responsibility.

Q. How many shares of du Pont common stock are held

[544]

by the bank in trust with investment responsibility?

A. We have about 258,000 shares of du Pont in 860 accounts with a market value of about $46 million.

Q. Does the bank currently permit its trust portfolio officers to purchase du Pont common stock?

A. Yes, it does. Du Pont common stock is on what we call our representative common stock list. It is a rather long list of common stocks which have been approved for purchase by the portfolio officers of the trust department. They may buy those securities in whatever amounts are appropriate for the individual accounts.

Q. Do you happen to know how long du Pont has been on this representative common stock list?

A. Oh, for at least the last ten years.

Q. Mr. Harter, how many shares of Christiana common stock does the bank hold in trust?

A. We have about 4,000 shares, with a market value of $720,000.

Q. In your work, sir, as senior industrial analyst, did you have occasions to consider mergers and other reorganization proposals involving industrial companies?

A. Yes, sir. As senior industrial analyst, I had the responsibility for preparing recommendations not only on

individual securities but also on the voting of stock in reorganizations where stockholder approval was requested.

[545]

Q. Would you describe the functions of the officers' investment committee?

A. The officers' investment committee is the—as I mentioned before, the top policy-making committee for the trust division from an investment viewpoint. It is a group of about 35 persons. They meet once a week to consider overall investment policy, review reports on individual companies and industries, and to pass upon recommendations on individual companies and on such matters as recapitalizations and mergers.

Q. Mr. Harter, in addition to the work you perform directly in reviewing reorganizations and preparing investment recommendations, have you also considered such matters as a member of the officers' review committee?

A. Yes, sir.

Q. Mr. Harter, are you familiar with the evaluation of closed-end investment companies?

A. Yes. As head of the special assets department I have been responsible on numerous occasions for valuing securities of closely held investment companies, primarily for estate tax purposes.

Typically, these are family holding companies for which there is no public market.

Q. Are you familiar with the fact that the stock of many publicly held closed-end investment companies sells at

[546]

a discount from the market value of underlying assets of those companies?

A. Yes, sir.

In the evaluation of the securities of the closely held investment companies it has been my practice to determine the net asset value taking portfolio securities at market prices. I then examine a group of publicly owned and publicly traded closed-end investment companies to determine the discounts at which their securities are selling in relation to their net asset value. From this group I select a representative discount to apply to the net asset value of the closely held corporation in order to arrive at a fair market value.

Q. And this process of evaluation is to determine the fair market value of the investment company's outstanding stock principally for estate tax purposes?

A. Yes, sir.

Q. Mr. Harter, what, in your opinion, are the principal factors that lead to the market price of publicly held closed-end investment companies representing a discount from underlying net asset value?

A. Well, there are various factors that enter into the discount. In my opinion the principal factor is the liability for capital gains taxes on unrealized appreciation. Other factors which might affect a discount might be the

[547]

performance record of a fund, the nature of the securities held, whether they are blue chips or speculative securities, and the psychology of the market at the time.

Mr. Smith: I would like to have marked for identification at this time du Pont Exhibit No. 5, which is a document entitled "E. I. du Pont de Nemours & Co., Notice of and Proxy Statement for Special Meeting of Stockholders." And it is identified at the top as "Preliminary Copy."

This is part of the record. It was filed as part of the joint application, and it is already part of the record in this case. I would like to have it marked for identification at this time. We will later present a witness who will testify as to the matters contained therein. But as I explained before lunch, we are going a little bit out of order because of Mr. Harter's problem on getting back to the bank.

Judge Ullman: Very well.

(du Pont Exhibit 5 was marked for identification.)

By Mr. Smith:

Q. Mr. Harter, have you examined the exhibit which has been marked du Pont Exhibit 5, the preliminary proxy statement?

A. Yes, sir, I have.

Q. May I call your attention to page 4. At the

[548]

bottom of that page there is a paragraph which begins "Christiana common stock has traditionally traded at a discount compared to the market value of the net assets underlying the Christiana common stock. Over the two years preceding April 28, 1972, the date on which it was announced publicly that a possible merger would be considered, this discount generally was in the range of 20 to 25 percent—and was 23 percent on that date."

Mr. Harter, based on your review of the preliminary proxy statement, do you have any opinion as to factors which might have caused this discount referred to?

A. Yes. I think primarily it reflects the capital gains tax liability. On that date, April 28, 1972, the du Pont common stock owned by Christiana had a market value of

well over $2 billion, and a tax cost basis of $74, $75 million, the balance being the unrealized appreciation subject to tax. At a 30 percent tax rate, the capital gains tax on that appreciation would be equivalent to about 29 percent of the total market value of the securities held. With the Christiana stock selling at a 23 percent discount, I would say that was a fair reflection of the tax liability.

Q. Mr. Harter, you testified that you have examined this preliminary proxy statement. On the basis of this review, and assuming that a final proxy statement is submitted to the stockholders of du Pont setting forth the merger

[549]

terms contained in the preliminary proxy statement, and assuming that the matters of fact set forth in the proxy statement are substantially as set forth in the copy you have examined, will you recommend that the bank vote its trust holdings of du Pont common stock in favor of the merger?

A. Yes. On that basis I will recommend that the shares be voted for the merger.

Q. Would you explain the basis on which you have reached this conclusion?

A. It is apparent from the preliminary proxy statement that the merger terms are based primarily on the net asset value of Christiana Securities. In my opinion, it is fair and reasonable to value investment companies at their net asset value.

In this particular case, the du Pont common stock now held by Christiana Securities will be taken over by du Pont and immediately cancelled so that there will be no capital gains tax on the unrealized appreciation on those securities.

As I just mentioned, in my opinion one of the principal factors accounting for the discount at which investment company securities sell from their net asset value is this exposure to capital gains tax. With the elimination of that tax there should be little or no weight given to the market value of Christiana common stock.

Q. Mr. Harter, are you aware of any alternatives

[550]

available to Christiana by which it might be able to——

A. No, sir, I am not.

Q. —achieve the total net asset value?

A. No, sir, I am not.

Q. Does the absence of any alternatives to Christiana affect your view as a person with responsibility for 258,000 shares of du Pont common stock as to the merger terms?

A. No, that would not affect my opinion.

Q. Have you had occasion to review the computation of net asset value of Christiana which is set forth in the preliminary proxy statement?

A. Yes, I have. And I am in agreement with the computations used. Since du Pont Company intends to dispose of its holdings in the Wilmington Trust Company and the News-Journal, it seems appropriate to take into consideration the capital gains taxes on those transactions. Also, because of the many uncertainties surrounding Christiana's tax claim, it seems appropriate to eliminate that claim from the merger considerations and to provide alternate means by which any recovery of that claim can be passed on to the Christiana stockholders.

Q. Have you had occasion to consider the merger terms in relation to, say, a year-end relationship of the net asset value of Christiana to the du Pont price over a period of time?

[551]

A. I have made a study of the Christiana year-end net asset value in relationship to the year-end market prices of du Pont common stock for each year from 1965 to 1971. For the purposes of that calculation I eliminated the tax claim in all years, and I deducted the Christiana preferred stock at its redemption price of $120 a share. The result of the study was an average exchange ratio of 1.15 shares of du Pont common for each share of Christiana, which is very close to the 1.123 shares of the merger terms.

Q. Mr. Harter, in your opinion, is du Pont receiving adequate benefits in this merger?

A. Yes, sir. As a stockholder of du Pont, I would regard the dispersion of the 28 percent interest now held by Christiana Securities among some 7,000 or 8,000 stockholders as being a very significant benefit to du Pont. At the same time, there would appear to be no disadvantages to du Pont in the merger.

In my opinion, so long as the merger terms would involve no dilution in the pro forma earnings per share of du Pont, I would consider them as reasonable.

Actually, since there is a 2½ percent discount from net asset value of Christiana, there is a 4 cents per share increase in the pro forma earnings per share of du Pont. This will probably not be reflected in the market price, but at the same time, under the circumstances, I would regard it

[552]

as a reasonable inducement to du Pont stockholders.

[553]

Q. Mr. Harter, did you consider whether there might be any adverse market impact following this merger resulting from possible sales by shareholders of Christiana?

A. No, my analysis was based on a study of the proxy material. The material made no mention of any such distributions that were pending or might be forthcoming. Under full disclosure requirements I would expect that if either of the companies had any knowledge of such a distribution, that it would have been mentioned in the proxy material.

Also, the capital gains tax problem that is presented to the long-time large stockholders of Christiana securities would undoubtedly be a very strong deterrent in their selling their shares.

Q. What is the capital gains tax impact to which you are referring?

A. The difference between their cost basis and the selling price. The cost basis on their Christiana securities would, of course, be carried over into the du Pont stock.

Q. Do you have any reason to believe that the cost basis of Christiana shareholders might differ in any material respect from that of the average investor?

A. Yes. Since these are long-term family holdings they are probably reasonably low cost to start with, and then by virtue of the General Motors distributions that were made, their cost basis must have been reduced to zero or very

[554]

close to that.

Q. Do any of the holdings of Christiana common stock by the bank have an unusually low cost basis for these reasons?

A. I cannot speak for the present cost basis, but I do know that at the time of the General Motors distributions our Christiana holdings were reduced to low cost at that time.

Q. Mr. Harter, in your opinion are the terms of the merger fair and reasonable to du Pont and its stockholders?

A. Yes, they are.

Mr. Smith: Thank you, sir.

Judge Ullman: Mr. Collins, do you have cross-examination, sir?

Mr. Collins: A few questions, Your Honor.

By Mr. Collins:

Q. Mr. Harter, yesterday there was a Mr. Edward Townsend who came down here and testified. He is with The First Boston Corporation. And he said that before he was with The First Boston Corporation he was with the Central Hanover Trust Company in New York. Were you working with him at the time?

A. I did not know him at the time. We just happened to overlap for a very short period of time. I came with the bank just about the time that he left.

• • •

[576]

• • •

Q. Well, then, in this situation you clearly are the person within the bank who knows the most about——

A. Yes, sir.

Q. —this proposed merger.

I believe you testified, Mr. Harter, that the absence of alternatives did not—or would not in any way affect your decision to vote favorably for this merger. Is that correct?

A. Would you say that again? Read it back.

Judge Ullman: Would the reporter please read the question.

(Question read.)

The Witness: That is correct.

By Mr. Anderson:

Q. On the other hand, would you find the absence of alternatives in any way supporting your decision to vote affirmatively for this merger?

A. No, I think it is just not a factor in the decision.

Mr. Anderson: No further questions. Thank you, Mr. Harter.

Judge Ullman: Mr. Smith, is there anything further?

Mr. Smith: We have nothing further, Your Honor.

• • •

[608]

C. EDWARD MIDGLEY.

By Mr. Murtaugh:

• • •

A. If your question—and if I heard it correctly—was that if 28 percent of the du Pont stock were immediately going to be sold on the market——

Q. I didn't say immediately. I said it would be sold—it was available for sale and will be sold to some extent, some will rush at the first probably and then a little slower at the end, or maybe a little slower in the middle and not much of a rush at the first. But don't you think that is a

serious consideration in considering whether the outside shareholders of du Pont should vote in favor of the merger?

A. To answer that may I assume the present situation instead of the hypothetical one that you came to Kidder with?

Q. O. K.

A. As I indicated this morning, I think the possible market impact after the merger is a very important factor because from the point of view of the Christiana stockholder it is his principal asset. And I feel that we have done extensive study and research and have satisfied ourselves, and I think subsequent events has borne us out, that most of the available—most of the new du Pont shares will not be put into the market place.

• • •

[625]

By Mr. Anderson:

• • •

Q. And in your opinion the du Pont Corporation is being compensated adequately for its role in helping the Christiana shareholders receive their—realize their net asset value on this proposed merger?

A. Yes, sir.

Q. Would you say so in part because although a substantial benefit is being realized by the Christiana shareholders it is not at any particular cost to the du Pont Corporation?

A. That would be part of our—the basis for that judgment, yes, sir.

Q. I believe in another part of your testimony you referred to the fact that du Pont was gaining through this

merger the potential to control itself, or taking away a potential block of control of itself. Is that correct?

A. I believe that comment that you are referring to arose from my parenthetical digression, if you will, in response to a question by—or my direct testimony where we were talking about if we had chosen the market value approach as opposed to net asset we might—is that the area that your question is?

• • •

[632]

PROCEEDINGS.

Judge Ullman: The hearing will please come to order.

Mr. Anderson, I believe one of the first matters on the agenda was the movement of a Division exhibit into evidence.

Mr. Anderson: Yes, Your Honor. Just before the reporter collapsed yesterday, I meant to move Division Exhibit 12 marked for identification into evidence. And I do so now.

Judge Ullman: Is there any objection?

It is received, with my added notation that Mr. Anderson's comment was made in jest. Half in jest, I should say.

(Division's Exhibit No. 12 was received in evidence.)

Judge Ullman: Mr. Smith?

Mr. Smith: I would like to call Mr. L. E. Grimes to the stand.

Whereupon,

L. E. GRIMES

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Smith:

Q. Would you state your name and business address for the record, please?

A. My name is L. E. Grimes. My business address is

[633]

1007 Market Street, Wilmington, Delaware.

Q. What is your present position with the du Pont Company, Mr. Grimes?

A. I am an assistant treasurer of the du Pont Company.

Q. How long have you held that position?

A. Since 1962.

Q. Would you describe your prior positions with the du Pont Company?

A. For a period of some 25 years or so I held a variety of supervisory and management positions in the accounting and financial areas of the company's activities.

Q. Sir, would you describe your responsibilities in connection with the proposed merger of Christiana into the du Pont Company?

A. My general responsibility on that matter was to organize and supervise the work of a financial staff group to perform the staff work that was required by the company to study and work out the various problems and so on of the matter. And those activities were carried out within the general framework of guidance from our negotiating committee and from counsel.

Q. Sir, following the initiation of the merger proposal by Christiana, did you prepare any documents for the guidance of the management of du Pont and its counsel?

A. Yes. I prepared various documents. The initial

[634]

one I think was a memorandum for counsel to outline the background material on Christiana and the du Pont Company, and mention and analyze and comment on a variety of matters that we thought might be pertinent for consideration in studying the merger proposal.

Q. Were you responsible for the preparation of supporting material for the use of the special negotiating committee appointed by the du Pont Company?

A. Yes. That was a continuing function, to assemble and make available to the negotiating committee a wide variety of material and analysis work that might be useful for them in their consideration of the matter.

Q. Were you responsible for giving any material to the investment banking firms retained by the du Pont special committee?

A. Yes. We assembled a collection of background material, principally financial, and made it available to Morgan Stanley and to First Boston Corporation to give them that kind of background as a start to study the merger proposal.

Q. And were you available for consultation, either at meetings or by telephone, to those two firms?

A. Yes, I was, and I did engage in that kind of activity.

Q. Mr. Grimes, following the agreement of the special committees of the two companies as to merger materials, what

[635]

was your responsibility in connection with the preparation of a merger agreement?

A. It was my responsibility to represent du Pont interests in drafting that agreement, working with our counsel and in collaboration with counsel for Christiana.

Q. Late in July the du Pont Company and the Christiana Company filed a joint application to the Securities and Exchange Commission for authorization under the Investment Company Act. Were you responsible for the preparation of that document insofar as du Pont is concerned?

A. Yes. That was developed in the same manner as the merger agreement.

Q. There were some six amendments to that application filed. Did you likewise have responsibility for the preparation of those amendments?

A. Same approach.

Q. Yesterday there was marked for identification du Pont Exhibit 5, which bears the title "Notice of and proxy statement for special meeting." It is marked as a preliminary copy.

Do you have a copy of du Pont Exhibit 5 in front of you, Mr. Grimes?

A. Yes, the preliminary proxy statement.

Q. Was this filed as an amendment to the joint application?

[636]

A. Yes, it was filed in one of the amendments to the application. I believe it was Amendment No. 5.

Q. Was this proxy statement prepared under your supervision and direction?

A. Again, it was with the assistance of counsel and in collaboration with counsel for Christiana.

Q. In your employment at the du Pont Company have you had occasion to become generally familiar with the preparation of proxy material and other documents for submission to the Securities and Exchange Commission?

A. Yes. I have prepared material of this character on a number of occasions.

Q. Mr. Grimes, the proxy statement contains business and financial data relating to the du Pont Company. Are you generally familiar with the matter contained in the proxy statement insofar as it relates to du Pont?

A. Yes. I think I am quite familiar with that material. I have been exposed to that background for about 35 or 36 years.

Q. The proxy statement also contains data concerning Christiana Securities Company. Are you generally familiar with the matters set forth concerning Christiana in the proxy statement?

A. Yes, I am also generally familiar with the Christiana material and background.

[637]

Q. Mr. Grimes, I would like to direct your attention to page 20 of du Pont Exhibit 5. At the top of that page there is a caption, "Rights of Christiana Preferred Stockholders Objecting to the Merger." And in general the material under that caption indicates that holders of Christiana preferred stock will have appraisal rights under Delaware law in connection with this merger. It further indicates that a person who perfects those appraisal rights is entitled to have the value of his stock determined by an appraiser appointed by the Delaware Court of Chancery.

It does provide, however, that prior to a court proceeding du Pont and the stockholder who perfects his appraisal rights may agree as to the value of the stock.

Has the du Pont Company indicated any intention as to the course which it will follow as to any Christiana preferred stockholder who perfects his appraisal rights?

A. Yes, it has.

Q. And what is that intention?

A. We have indicated it is the present intention of du Pont to offer $120 in cash per share for the Christiana preferred stock in any case of a stockholder who objects to the merger and perfects his appraisal rights and demands such payment.

Q. And have you indicated that intent to the Christiana Securities Company?

[638]

A. Yes, we have.

Q. Do you happen to know if they have taken any action on that?

A. I understand that they sent a letter to each of the preferred stockholders to that effect recently, sometime in December. In fact, I have seen a copy of that letter.

Q. Now, Mr. Grimes, I would like to direct your attention to page 17 of the proxy statement, du Pont Exhibit 5.

The first caption on that page is, "Affiliates of Christiana," and the material under that caption states that directors of Christiana and certain other stockholders of that company may be deemed to be affiliates of Christiana within the meaning of the Securities Act of 1933 and the rules and regulations thereunder.

Would you explain what an affiliate is?

A. The regulations under the 1933 Act specify a definition of an affiliate for purposes of that Act, and the definition that is specified is that any person who controls, is controlled by, or is under common control with another person is deemed to be an affiliate of that other person.

We have been advised by counsel that that definition should not be construed narrowly to apply only to situations where actual control or controlling influence might exist because the Commission interprets it more broadly to embrace as well situations where there might be potential for control

[639]

or exercising of controlling influence.

Q. Mr. Grimes, how did you determine those persons who might be deemed to be affiliates of Christiana?

A. Well, the application of the definition that I have just mentioned to the particular case in hand here is not so very easy. There are a number of relationships among du Pont and Christiana and Wilmington Trust Company, relationships in the form of stockholdings, relationships in the area of directors where some directors are directors of two of the companies and indeed some are directors of all three of those companies. And also there is a range of commercial business relationships aside from that. So those factors made it quite difficult, and indeed we thought impossible, to make any precise determination as to the degree of control or controlling influence that might exist for purposes of identifying who affiliates might be. And in studying the matter with our counsel and with counsel for Christiana, we arrived at a conclusion that we all felt was the right one: That in the interests of making sure that du Pont observed its responsibilities under the securities laws and that our stockholders would do likewise, we would proceed to identify affiliates on the basis of the assumption, without any prejudice to whether that is the fact or not, that at the time of the merger du Pont and Christiana and Wilmington Trust would be considered to be under common control.

[640]

Q. Now, what categories of individuals and corporations or other entities are affiliates as would flow from that position which was taken?

A. There flows from that basic determination a list of affiliates along these lines: First, each director of du Pont would be deemed to be an affiliate under that approach. Also, each director of Christiana would be deemed to be an affiliate. The Wilmington Trust Company as an independent business entity in itself would be deemed to be an affiliate. Each of the directors of Wilmington Trust would be deemed to be an affiliate.

In the process of our studies we learned that there are a few instances of charitable foundations, four in number, in fact, where there is an appreciable number of the directors of one or the other of the companies among their trustees and there might be a situation that could be considered that those people could control the foundation, so we chose to deem them to be affiliates for this purpose.

And then in addition, any trust or any estate or any corporation or other business entity if there might be such a thing in which any of the people that I have mentioned as affiliates could be deemed to be in control or have a beneficial interest in also would be affiliates, which aggregates to quite a few affiliates.

Q. Mr. Grimes, on Monday Mr. Ernest May appeared and he

[641]

stated, as I recall, that he owned directly about .06 percent of the outstanding stock of Christiana, and he indicated that he believed that some position had been taken that this stock was restricted stock, possibly on the grounds that he was a part of this group of affiliates that you have mentioned.

Have you had occasion to consider the matter of Mr. Ernest May?

A. Yes, we have considered his holding in the course of our analysis of this matter.

Q. Have you determined whether he will be treated as an affiliate?

A. We have determined that the stock that he holds directly would not be considered to be stock held by an affiliate.

Q. Now, as I recall, Mr. May also mentioned that a member of his family, I believe his wife, had some holdings that were held in trust, and he indicated that this stock might also be treated as restricted stock.

A. Yes.

Q. Do you know the stock to which he is referring?

A. Yes, I think I do.

Q. What sort of trusts are involved in that case?

A. I believe those shares are held in trust for which there are three individuals operating as the trustees for the trust.

[642]

Q. Are any of those individuals affiliates under the definition that you have——

A. Yes. One of those trustees is Mr. Irénée du Pont who is a director of du Pont, a director of Christiana, president of Christiana, and a director of Wilmington Trust, also, I believe.

Q. Prior to the commencement of these hearings had you had occasion to inform Mr. May of the determination with respect to the two stockholdings as to which he testified?

A. Yes, I did.

Q. When was that?

A. In October of '72, I believe.

Q. You made clear to Mr. May that the stockholdings in the trust to which he referred would be treated as restricted stock because it is under the control of an affiliate?

A. Yes, I think that is correct.

[643]

Q. Now, Mr. Grimes, on the basis of the determination of affiliates of Christiana to which you referred, can you tell me how du Pont determined what amount of Christiana common stock were held by such affiliates?

A. Yes, I can. We arranged for each of the companies, du Pont, Christiana, and Wilmington Trust, to send a questionnaire to their directors and ask for them to report their holdings of Christiana stock and du Pont stock as of the end of September, 1972. And the responses to those questionnaires gave us information as to the holdings of the individual directors of the three companies.

We obtained similar data by questionnaire from the charitable foundations that I have mentioned, and as a result of some discussions with Wilmington Trust, Wilmington Trust has analyzed their holdings and given us information on their holdings of Christiana stock as of a more recent date, somewhere in mid-January of this year, I think January the 17th or 19th; I am not sure of the exact date.

Q. What is the approximate total amount of shares of Christiana held by affiliates based on this investigation which you have made?

A. After having assembled all this information and arriving at an aggregate, we find that nearly nine million shares of the outstanding shares of Christiana common stock

[644]

are held by people that we propose to treat as affiliates,

and that represents slightly more than 75 percent of the outstanding shares.

Q. Mr. Grimes, would you explain what restrictions apply to affiliates of Christiana under the Securities Act of 1933 with respect to stock of the du Pont Company received in the merger?

A. It is my understanding that affiliates of Christiana who receive du Pont stock in the merger will not be permitted to make public sales of those shares of stock except by two means. First I understand they will be permitted under the provisions of the '33 Act to dispose of any volume of shares that they might wish at any time provided the sale of the shares is covered by an effective registration statement; and secondly, without registration individual affiliates I understand would be in position to sell subject to certain detailed limitations on how they handle the transaction, up to about one week's trading volume in a six-month period—one week's trading volume in du Pont stock in a six-month period in so-called brokers' transactions. That would mean that an individual affiliate could sell upwards of 50,000 or 60,000 shares in a six-month period, perhaps more, depending upon the volume of trading in du Pont at the time.

Q. Mr. Grimes, if affiliates of Christiana were to

[645]

develop a plan to act in concert to sell under this broker's transaction which you have referred to, would each such affiliate be entitled to sell up to one week's trading volume?

A. The comment I just made on individual affiliates having the opportunity to sell up to that volume was on the assumption there would be no acting in concert. In the event that two or more of them should proceed in such a manner that it would constitute acting in concert, then the

limitation would apply to that group as a whole rather than to the individuals, and the group as a whole would be restricted to that level of sales.

Q. Mr. Grimes, again at page 17 of du Pont Exhibit 5 there is a statement towards the end of the first paragraph under the caption "Affiliates of Christiana" that du Pont has agreed with affiliates that they will receive certain registration rights under the Securities Act of 1933. Would you describe those rights, please?

A. Our present plan is to make available to the Christiana affiliates the right to register their shares on two occasions if they desire to do so and ask us to file a registration statement—two occasions during a calendar year, one occasion to make sales during the month of April, and on the other occasion, to make sales during the month of October. And there is no specific requirement of volume involved in those aspects of the registration rights.

[646]

Independent of that particular provision——

Q. May I stop you just a moment there. Are there any limitations as to the type of sales which may be made under registration rights during April and October?

A. Oh, yes. I failed to mention, the sales pursuant to those registrations cannot be in the nature of firm commitment underwritten sales.

Q. I am sorry I interrupted you. You were about to say that there is an additional registration right?

A. I am about to come to firm commitment underwritten sales now.

Independent of the arrangement for registrations and for sales in April and October we have agreed to file one registration statement in a calendar year if requested by one or more of the affiliates for a firm commitment underwritten offering, subject to the provisos that such an offering not be at the same time as the April and October sales and subject further to the proviso that the amount involved be at least $25 million.

Q. And that would be one registration right a year for all persons who were affiliates?

A. That is correct. One registration right in that year.

Q. In other words, a person would be given an opportunity to join in it, but if he did not join in it he would not have

[647]

any further right during the course of that year to request a firm commitment underwritten offering from the du Pont Company.

A. That is correct.

Q. Did you have any advice from investment bankers in developing this registration rights proposal?

A. Yes. We discussed the matter with Morgan Stanley jointly with counsel for Christiana, and out of those conversations developed this pattern of registration rights that seemed reasonable in the circumstances.

Q. Mr. Grimes, we have heard testimony here the past several days that secondary offerings, and particularly large secondary offerings, require a certain amount of skill and expertise in the placement of stock and the distribution of stock in order that the marketing program be handled successfully.

Under the general agreement as to registration rights which you have described, has du Pont taken any steps to assure that a skilled senior managing underwriter will be available to handle any firm commitment underwritten secondary?

A. Yes, we have. We have provided in the form of agreement that we intend to enter into with the affiliates

that in the case—in the event there is any such underwritten offering it will be handled by an underwriter

[648]

with Morgan Stanley as the underwriter or alternatively some other underwriter that would be acceptable to du Pont.

Q. Mr. Grimes, has du Pont ever entered into a contract providing for registration rights in connection with unwritten secondaries before?

A. Not to my knowledge.

Q. For example, in the acquisition of the Endo Pharmaceutical Company?

A. I will correct myself if I may. I was thinking of the former registration that we filed in that case. But it is true that the contract we entered into provided that the Endo people in the acquisition transaction we had three or four years ago would be entitled to have underwritten offerings if they requested them. They have not requested any as yet.

Q. Does the contract provide a similar form of protection insofar as du Pont Company is concerned with respect to the senior managing underwriter of such a secondary offering?

A. Yes, it does. Slightly different form in that case. Morgan Stanley is designated as one of the acceptable underwriters and three or four other firms were also mentioned by name as being the firms that would be acceptable for the purpose. At the request of the attorneys for the other side we specifically identified firms in that case.

Q. I take it there was no such proposal to specifically

[649]

identify other firms here?

A. No, there was not.

Q. Mr. Grimes, has the registration rights agreement which you have described been reduced to a written form?

A. Yes. I think it must be said to be draft form at this stage, however, because we have a few minor details yet to be settled in some conversations we are having with Wilmington Trust about the matter. But I believe the draft is substantially as the end result will be.

Q. Has there been general agreement on the part of all persons concerned with this as to the basic framework which you have described?

A. Yes. The general pattern of registration rights has been found to be acceptable to all parties.

Q. And you have testified that du Pont intends to treat the Wilmington Trust Company as an affiliate, and you have stated that you have discussed the registration rights agreement with that bank?

A. Yes. We made a draft of the agreement available to them because of their substantial potential holdings of our stock and invited their comment, and indeed made some editorial changes as a result of their comment. And I have discussed it with them, with officers of Wilmington on two or three occasions.

Q. And have they indicated that they have agreed in

[650]

principle to the format of the registration rights agreement?

A. Yes, they have.

Q. Mr. Grimes, yesterday Mr. Raymond Harter testified, and in the course of his testimony he indicated that he had examined du Pont Exhibit 5, and he was asked whether he was aware of any significant sales to take place following the merger. He stated that the document he had examined, du Pont Exhibit 5, did not indicate that there

were any plans to dispose of the stock by the former shareholders of Christiana following the merger.

Now, you have testified that you were responsible for the preparation of du Pont Exhibit 5. In the course of your work have you had occasion to consider whether there are any plans on behalf of large Christiana stockholders to sell du Pont stock which they may receive in the merger?

A. Yes, I have.

Q. When was the first occasion on which this matter was discussed?

A. The first occasion that we discussed this area of the matter was on April 28th, the day that the public announcement was made that du Pont and Christiana would consider a possible merger.

Q. What happened on April 28th?

A. On April 28 there was a meeting in Wilmington of counsel for Christiana, counsel for du Pont, and some

[651]

representatives of du Pont to work out a general coordinated plan for each of the companies to approach the study of the merger and collaborate in drafting the documents and the development of background material and so on. In the course of that meeting, counsel for Christiana made it plain that they would expect in the event that the transaction matured to ask for registration rights for the affiliates who might be restricted in sales of their stock so that they could be in position to sell shares of du Pont after the merger if they wished to.

We discussed at some length the question whether anyone at the meeting had any knowledge of any intent on the part of any person to sell shares of du Pont following the merger. Among the du Pont people and among the du Pont counsel there was no knowledge of that.

We asked Christiana counsel what they knew about the matter, and they assured us that they had considered it carefully and were quite sure that there was no intent to make sales in any substantial volume following the merger and felt that they had good reason to have that belief, but nevertheless said that at our request they would investigate the matter in more detail to suit at a later time.

Q. Subsequent to the meeting on April 28th did you have any further report on whether this study and investigation had been made?

[652]

A. Yes. Yes, I did.

Q. When was that?

A. That was in the latter part of July. I don't know the exact date, but it came about at the time that I was having discussion with Christiana counsel regarding the filing of the requests for a tax ruling, one part of which is the need to make a representation as to continued holdings of shares received in the merger relative to a requirement of the tax law for continuity of interest for a tax-free ruling. And I asked Christiana counsel to tell me what the outcome of their investigation on the matter of intents to sell had been and was informed by Christiana counsel that at the meeting on July 17th, when the matter of approving the proposed merger in principle was before the Christiana board, that they had polled the Christiana board individually asking them, each person, whether he had any intent to sell any of the shares received in the merger or knew of anyone who had any such intent, and the result of that was a negative response from each of the directors of Christiana.

Christiana counsel further told me that with the approval of the Christiana board within a day or two after that they had discussed with officers of Wilmington Trust

Company what the intent of the Wilmington Trust Company might be regarding sales of du Pont stock received in the merger, and were informed by the officers of Wilmington Trust Company

[653]

that they had no present intention to make any sales of stock after the merger; however, their fiduciary responsibilities might require them to make sales from time to time in the event of deaths and the requirement for settlement of estates and that sort of thing.

Q. In the course of your negotiation of the registration rights agreement, has any affiliate of Christiana ever indicated to you that he has a present intention to dispose of stock following the merger?

A. No, sir.

Q. Does that include discussions with Wilmington Trust Company?

A. Yes. In the course of my discussions with Wilmington Trust Company, they have said to me at least once and perhaps more that they have no present intention to make any sales of stock—du Pont stock following the merger, but they have also said to me as they did to Christiana counsel that they operate in a fiduciary capacity and have to meet their fiduciary responsibilities and undoubtedly from time to time if they need to settle an estate or for some other specific reason they might be required to make sales of du Pont stock.

Mr. Smith: I would like to have marked for identification Applicants' Joint Exhibit No. 4, which is entitled "Agreement and Plan of Reorganization," and the first line indicates that it is dated December 20th, 1972.

[654]

(Applicants' Joint Exhibit 4 was marked for identification.)

By Mr. Smith:

Q. Mr. Grimes, earlier you testified that you were responsible, along with the assistance of counsel, for preparation of the agreement and plan of reorganization with respect to merger. Is this document which has been marked for identification as Applicants' Joint Exhibit No. 4 the end product of your work?

A. Yes, sir, it is.

Q. Now, you will note that the exhibit is dated December 20, 1972. Were earlier drafts of this document filed with the Securities and Exchange Commission as part of the joint application?

A. Yes. The document that we are talking about here dated December 20 was executed on that day by the companies involved, but an earlier copy of this was a part of the proxy statement that we had been discussing earlier which was filed as an amendment to the application for exemption order I believe as a part of Amendment No. 5.

Q. Is the Applicants' Joint Exhibit No. 4 substantially the same document as the draft agreement which was filed as part of the proxy statement?

A. Yes, it is. There are a few minor changes, mainly of an editorial nature.

[655]

Mr. Smith: Your Honor, I would like to have received in evidence Applicants' Joint Exhibit No. 4 as well as du Pont Exhibit No. 5.

Judge Ullman: Is there any objection?

Mr. Murtaugh: Du Pont 5 is what?

Mr. Smith: Du Pont 5 is the preliminary proxy statement which was marked for identification yesterday.

Mr. Murtaugh: I see. Thank you.

No objection.

Judge Ullman: Received.

(Applicants' Joint Exhibit 4 and du Pont Exhibit 5 were received in evidence.)

Mr. Smith: That is all I have, Your Honor.

Judge Ullman: Is there cross-examination? Mr. Collins?

Mr. Collins: No questions, Your Honor.

Judge Ullman: Mr. Murtaugh?

Mr. Murtaugh: Yes, I would like to ask a few questions.

CROSS-EXAMINATION.

By Mr. Murtaugh:

• • •

[663]

• • •

Q. Would you tell me what—if you assume you can't have a firm commitment underwritten manner what other kind could there be?

A. I would not think in those cases there would be an underwriting, although its is conceivable that somebody might work out a best efforts underwriting arrangement. I believe there are such things as that although I don't profess to be an expert in that area.

Q. I have read in the field literature about the best efforts type of underwriting, and it is not all that uncommon, is it, to the best of your knowledge?

A. I think it is perhaps a common practice. Not nearly so common as firm commitment underwritten offerings.

Q. So if a person had we will say 20,000 shares of Christiana and came in in April and October and just proposed to sell them on a registered basis through a best efforts underwriter he could go anywhere and do it; is that correct?

A. He would have du Pont shares, sir.

Q. I mean du Pont shares, yes, I beg your pardon. He could go into any house that would handle it and do it. Isn't that correct?

A. Yes, he could. It would be my expectation that the sales made in the April and October registrations in the main would be made through normal stock exchange channels.

• • •

[668]

A. It is important because it impacts on the question of what the nature of the transaction is and also is important as a matter of disclosure in making known to our stockholders the material facts on the transaction when we send out our proxy statement.

Q. Well, in connection with that last point, where in the proxy statement is some fact about that made known?

A. There is no statement in the proxy statement on that matter.

Q. Well,—would you read back the answer to the preceding question, please?

(Record read.)

By Mr. Murtaugh:

Q. My only point was you said it was important to make it known on the data and maybe you would like to adjust your answer, or do you want to let it stand?

A. I didn't think I said anything about it being important to make it known except if we have facts to make known.

Q. Isn't the fact that you don't have facts even an important fact to make known?

A. I don't think it is customary in preparing a proxy statement to approach it on the basis of—well, let me say it the other way around. I think the—at least my understanding of what is required and appropriate to put in a

[669]

proxy statement is all the material facts. I would not think and do not think it is necessary to put in comments about absence of facts.

Q. A failure to omit a material fact strikes me as something that rings a bell in my mind. Isn't that an important thing?

A. I don't think we have omitted a material fact. There were no facts to omit.

Q. Did you consider getting anything in the way of a feedback by way of direct inquiry from Christiana shareholders that would be—you already answered you didn't make any inquiries to unrestricted. But as to the restricted shareholders, the investigation consisted of a polling of the directors and an inquiry of them as to whether they knew or knew of anybody that knew? Did they say they would inquire around and report back according to what your information is, or——

A. No. It was just as I said: That the counsel for Christiana asked them if they had any intentions to sell themselves or knew of anyone who intended to sell.

Q. Was that in connection with the application for the Internal Revenue which requires I think a certain percentage—is it 51 percent or something, you have to be sure that 51 percent are going to carry on more or less indefinitely?

A. My general understanding is that you must be able to

[670]

insure Internal Revenue that there will be a substantial continuity of interest. Just what that means in detail under the tax law, I wouldn't know. I am not very familiar with that area.

Q. I see.

Tell us, did you attend any of the meetings of the subcommittee of the du Pont corporation in connection with their sort of semi-formal or formal meetings with each other? They didn't have to be very formal. Did you attend some of those?

A. Yes, sir, I did.

Q. Did this subject of selling of shares by Christiana shareholders come up for further discussion in those groupings?

A. No, I think at the point where—are you speaking of the formal negotiating meetings we had after receiving the——

Q. I have a series of excerpts of minutes of the special committee, and I searched them rather thoroughly and saw no evidence of any mention of this question of market impact by reason of the transaction, and I was wondering if you could supplement those by telling me whether or not that subject was considered by the special committee in their meetings that I have the notations about.

Mr. Smith: Excuse me, Mr. Murtaugh. What special committee minutes are you referring to?

[671]

Mr. Murtaugh: Well, I got excerpts from your office.

Mr. Smith: Could you identify for Mr. Grimes the minutes to which you are referring?

Mr. Murtaugh: Yes, I will identify them here.

I asked Mr. Archie to get me some—were you able to get those? I guess the girl has them right there.

Mr. Gribbon: Your Honor, I might observe that other witnesses who are members of the executive committee and board of directors will be testifying, and Mr. Murtaugh may want to ask them questions relating to the meetings of the executive committee and board of directors, which I think are the minutes in your possession.

Mr. Murtaugh: Yes. I will just ask him generally.

By Mr. Murtaugh:

Q. Was that a subject of further discussion at meetings of the special committee that you attended after the—other than that you have testified to previously?

A. I have participated in discussions with members of our negotiating committee on this subject, yes, sir.

Q. What was the nature of the discussion?

A. The nature of discussions was a review and discussion of the information that I have described that we received from Christiana counsel.

Q. Yes. And that was about the extent of it; is that correct?

[672]

A. Yes, sir.

Q. How about the—no, that's all.

Do you view your position as determining policy or guiding—serving policy in connection with this whole matter?

A. I am the servant, not the guider, sir.

Q. So we can look to others, I presume, to question the reasons for the major scope of the decisions, and you were the executor of the wishes of the other group—higher group, I presume?

A. My function was to assemble and provide information and try hopefully in an understandable form, and following decisions, to do my best to implement those decisions.

Q. Now, generally speaking, do you know of any—can you add anything to the matter of information discussed by the subcommittee at subcommittee meetings or at meetings of the board of directors other than you have testified as to the extent of deliberation or information that you could give us as to the question of possible market impact of the introduction of Christiana shares in the form converted into du Pont shares in the du Pont market?

A. I don't think I have anything I can add to what I have said, sir.

Mr. Murtaugh: O.K. Thank you very much.

That is all.

[673]

Judge Ullman: Mr. Maher, do you have any questions?

Mr. Maher: No questions.

Mr. Osheroff: Just very briefly, Your Honor.

Judge Ullman: Yes.

By Mr. Osheroff:

Q. Mr. Grimes, you testified that you had discussed certain tax consequences with Christiana counsel of the merger as proposed. Is that correct? Prior to that, or during that meeting, had you had occasion to discuss at all the tax consequences of any alternative course of action by Christiana other than the merger with du Pont?

A. We had numerous discussions with counsel for Christiana on the matter of possible tax impact of a Section 333 liquidation, yes.

Q. You did. Could you tell me generally what the nature of those discussions were?

A. I think that initially this subject was opened perhaps at the April 28 meeting that I mentioned awhile ago, or if not, within a matter of a day or so after that.

Q. Pardon me. What date was that?

A. The April 28 meeting, at which we reached the decision to consider a merger. Not at the meeting I attended, but the date on which we announced the decision to consider a merger.

I was generally aware and I think counsel on all sides were generally aware that this was a possible method of

[674]

liquidation that Christiana could consider. It was given considerable attention in the background papers that were available to us on the Delaware Realty and Christiana merger. And we were all uncertain as to what the impact would be, and early on, perhaps by mid-May or maybe earlier, had concluded that this was a matter that Christiana counsel should study and try to develop the best analysis they could as to what the impact might be, so that that factor would be available to all parties to consider.

Q. Well, ultimately were you made aware of counsel's views with respect to a Section 333 liquidation? With respect to its effect on Christiana shareholders?

A. Yes. We had ultimately an opinion that the liquidation in accordance with that section was thought that it might be possible for the range of tax cost that has been mentioned here earlier this week, I believe 30 to 70 million dollars.

Q. My understanding of the testimony—some of the testimony this week is that 30 to 70 million dollar range, while initially thought to be the range, was subsequently dismissed and it was then considered that 333 liquidation was not feasible for various reasons. Is that correct?

A. That is correct. Counsel for Christiana after further discussion following their tentative opinion on the matter with our counsel and further study of the matter reached a conclusion it would not be a feasible thing to

[675]

consider within the time that we were working with this merger.

Q. Were you made aware within any degree of certainty as to what the actual impact of a Section 333 liquidation might be?

A. No, I was not. At one stage I had some understanding, although this is a very complex area that I am not particularly familiar with, as to the problem areas, and it was my understanding that the range of results that might emerge depending upon how those problems might be solved could be perhaps something in the range that had been considered earlier, or moderately higher, or alternatively could be very substantial.

Q. The ranges we are talking about is what might be considered to be profits and earnings of Christiana on which taxes would be due?

A. I think that is at least——

Q. It initially was a 30 to 70 million dollar figure, which at that time, as I understand, the worst impact to Christiana would be in the range of a 2.84 impact.

A. That was the upper range of the tax cost, I believe.

Q. The $70 million limit.

So you are saying that subsequently it was felt that the range might be perhaps in that area, perhaps slightly higher, perhaps considerably higher?

[676]

A. Very considerably higher was my understanding there was a possibility.

Q. When you say very considerably higher, were there any numbers involved?

A. There were no numbers, but I sort of manufactured in my mind a vision of maybe two or three or four hundred million dollars, maybe.

Q. Two or three or four hundred million dollars in taxes or in the determination as to profits?

A. Taxes, yes.

Q. As to taxes. How did you manufacture that number?

A. I just have a vivid imagination, I guess.

Q. Well, that is pretty vivid. But was that—that was not a product of any discussions with anybody?

A. Not at all. That was simply my own thoughts.

Q. Well, I don't deny that a vivid imagination could create that thought, but it would seem to me that the thought might originate from somewhere, some source.

A. Well, it originated, I think, from the understanding I had of the problem areas in regard to the undistributed profits of Christiana related to how the Delaware Realty merger transaction should be treated for purposes

of undistributed profits of Christiana for tax purposes, and moreover, how the distributions of General Motors stock that flowed through Christiana should be treated, and they were

• • •

[678]

RE-DIRECT EXAMINATION.

By Mr. Smith:

Q. Mr. Grimes, I believe Mr. Murtaugh asked you whether the Commission had approved the preliminary proxy statement which had been filed. Bearing in mind the Commission policy as to what it actually does with a proxy statement or registration statement, would you indicate whether you received comments on the preliminary proxy material?

A. No, sir, I have not received comments on it.

Q. You would not expect the Commission to formally approve the proxy statement; is that correct?

A. No, I would not.

Mr. Smith: Thank you.

Judge Ullman: You are excused, sir.

(Witness excused.)

Judge Ullman: We will be at recess until 11:30.

(Short recess taken.)

Judge Ullman: On the record.

Mr. Gribbon?

Mr. Gribbon: The applicant du Pont calls Mr. Shapiro.

Whereupon,

IRVING S. SHAPIRO

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

[679]

By Mr. Gribbon:

Q. Would you kindly state your name and business address?

A. My name is Irving S. Shapiro. I am with the du Pont Company, Wilmington, Delaware.

Q. Are you the Irving Shapiro who was a member of the special negotiating committee of the du Pont board of directors with respect to the Christiana merger?

A. Yes.

Q. Who was the other member of that committee?

A. Mr. C. B. McCoy, president and chairman of the company.

Q. What is your position with the du Pont Company?

A. I am a senior vice president, member of the executive committee, a member of the board of directors.

Q. How long have you held those positions?

A. Since September 1, 1970.

Q. What is your education, Mr. Shapiro?

A. I came out of law school in 1941.

Q. What law school?

A. The University of Minnesota.

Q. And what did you do thereafter?

A. I started with the idea that I might be a tax lawyer, but got over that idea very quickly, fortunately, and wound up here in Washington in January of 1942. Spent a year and a

[680]

half with the OPA which was just being organized at that time, and then moved over to the Department of Justice from 1943 until 1951, when I came to du Pont.

Q. In what division of the Department of Justice did you work?

A. I spent my entire period in the Criminal Division. Started out in the Appellate Section, basically writing briefs for the Supreme Court, and after a couple of years, taking on arguments for the Government in the Supreme Court and the various courts of appeals.

Q. And when did your work with the Department of Justice terminate?

A. 1951.

Q. And where have you been employed since 1951?

A. I left Washington in 1951 and joined the legal department of du Pont at that time and became responsible for legal guidance to some of our industrial departments, and beginning in 1952 became involved in the General Motors litigation, and have had some connection with it ever since, among other things.

Q. What position did you ultimately attain in the legal department of du Pont Company?

A. When I left the department I had been assistant general counsel for five years.

Q. When did you leave the legal department?

[681]

A. September 1, 1970.

Q. To take your position on the executive committee?

A. That is correct.

Q. How many members of the du Pont executive committee are there?

A. There are eight. The president and seven senior vice presidents.

Q. And what briefly is the role of the executive committee of du Pont in the operation of the du Pont Company?

A. Well, there are two different ways of going at it. In one sense the executive committee acts in the place of the board between board meetings. Viewed from an operating sense, our company business activities are divided by industrial departments. The head of each department is a vice president and general manager. He has responsibility for running the businesses under his jurisdiction. He in turn reports to the executive committee and the president.

Q. And do the individual members of the executive committee have responsibilities with particular phases of the du Pont Company's operations?

A. Yes. Each of us have an assigned liaison responsibility. The authority to run the businesses assigned to each department resides in the head of the department. But each of us functions in a liaison capacity between the heads of those departments and the executive committee, and

[682]

essentially that says that we have an obligation to be sure that we know what is going on in those departments and that we are transmitting to those departments the policy views of the top management of the company.

Q. For which departments of the du Pont Company do you, Mr. Shapiro, have the liaison responsibility on the executive committee?

A. Well, I have, for obvious reasons, the legal department, our treasurer's department, our fabrics and finishes department, our secretary's department, and our economist's—chief economist's office.

Q. You have then both the legal and the treasurer's department under your liaison responsibility?

A. Yes, I do.

Q. You mentioned in relating your experience with the legal department of du Pont Company that you had been involved in the General Motors litigation. Let me ask you, what was the extent of your involvement in the litigation which eventuated in an order requiring du Pont to divest itself of its General Motors stock?

A. In the part of the litigation that had to do with the merits of the Government's claim, the alleged violation of the antitrust laws, I was one of a multitude of lawyers working on various segments of the case that needed attention. I was part of a team that assembled the evidence and lined up

[683]

the witnesses for one aspect of the trade relations evidence that was given in Chicago.

Q. Now, taking the next inning, once it had been determined that there had been a violation of the Clayton Act and the question was what kind of an order should be entered by the court, what was your responsibility?

A. At that point in time I was given full responsibility within du Pont for working on those proceedings in conjunction with the guidance of our general counsel. And he and I spent—we were in Chicago for the full duration of those hearings and participated in them with our outside trial counsel.

Q. Did you then participate in developing and presenting the position of the du Pont Company with respect to the General Motors divestiture?

A. Yes, indeed. As a matter of fact, now that I think about it, even before we got to Chicago I worked extensively with one of your partners in interviewing financial houses, investors, and attending the meetings of our stock-

holders and of General Motors stockholders, all in preparation for the Chicago proceeding.

Q. Now, in conjunction with the divestiture, do you recall that there were also Congressional hearings relating to various proposals for tax legislation?

A. Yes, there were.

[684]

Q. To what extent, if any, did you participate in developing and presenting the position of the du Pont Company with respect to the legislative proposals regarding the General Motors divestiture?

A. I was in that picture from the day it started until the day it ended.

Q. Who was the principal representative of the du Pont Company in those proceedings?

A. You are talking now about the proceedings to get legislation?

Q. Yes.

A. The principal spokesman for the du Pont Company was Mr. Crawford Greenewalt, who was then president of the company.

Q. Was Mr. McCoy involved in those proceedings?

A. Not at all.

Q. Now, I direct your attention to the proceeding in Chicago having to do with the kind of an order that the court should enter to remedy the violation of Section 7. What was the program of the Antitrust Division that was put forward which du Pont opposed in that litigation?

A. The Antitrust Division proposed a decree which in essence said the following: du Pont must divest itself of 63 million shares of General Motors stock by transferring the shares to a trustee; the trustee in turn would sell the

[685]

shares allocable to Christiana and would distribute in ten annual installments the shares allocable to the other shareholders of du Pont.

Q. Now, did du Pont oppose that program of the Antitrust Division?

A. That is an understatement. Yes.

Q. In both the District Court and the Supreme Court?

A. That's right.

Q. And what, Mr. Shapiro, was the basis of du Pont's opposition to that program?

A. Let me say it this way. The decree that had been proposed exacted nothing from the du Pont Company. Once the Supreme Court had ordered du Pont to divest the shares, that was all that would be taken from the du Pont Company. What was left was the impact of the divestiture on our stockholders. And the entire battle in Chicago, and then again to the Supreme Court, and then again on the Hill, was to seek to ameliorate the consequences that would fall on our stockholders. And the consequences essentially came from the fact that the stockholders would be forced to receive the General Motors shares which they had already indirectly owned, and when they received them they would be taxed as though they were receiving a dividend. The financial consequences of that were enormous, and the expectation was that stockholders would have to raise capital to pay the taxes, and this in turn

[686]

would lead them to the market to sell in wholesale quantities the shares they had received, and this would come to the market on top of the sales being made by the trustee of the shares allocable to Christiana.

And to put the frosting on the cake, the problem was not one of one-year or two-year action, but a court order that would require this kind of activity in the market place year in and year out for ten years with everybody in the financial community knowing that the General Motors shares were coming.

Q. Now, did du Pont take the position that the program advanced by the Antitrust Division would have a significant market impact upon the General Motors stock?

A. We did. The testimony and the briefs both came to the argument that under the Government plan there would be market impacts in the range of, as I recall it, anywhere from 20 to 30 percent, depending on circumstances.

Q. Was that as a result merely of the sales of the stock, or was it the combined result from the Government program?

A. It was the result of a divestiture order calling for a ten-year program of divestiture. The overhang that came from that plus the sales by the trustee plus the disorganized sales by stockholders who would have to raise capital to pay taxes.

[687]

Q. Turning now to the Congressional hearings with respect to various tax proposals, approximately during what period were those hearings held?

A. The legislative effort, as I recall it, started after the second Supreme Court decision. There were two sets of hearings. I would guess that the first were probably in '59 or '60 and the second in '61, but I am not absolutely certain of the precise dates.

Q. At the time of these hearings was the program of the Antitrust Division which you have just described and which du Pont opposed still in the picture?

A. It was not. At least in some respects. As the case came to the Supreme Court on the second review of Judge LaBuy's decision, the Antitrust Division abandoned the decree it had advocated before Judge LaBuy, and instead argued to the Supreme Court that there ought to be divestiture over a ten-year period but that it had no interest in the means of divestiture, and indeed in that proceeding, as I remember it, the Antitrust Division suggested that it would be nice if Christiana was merged into du Pont and suggested to us the tax route for accomplishing that.

Q. Pardon me?

A. I say the Antitrust Division in its brief to the court suggested that one of the means by which the divestiture problem could be accomplished encompassed having Christiana

[688]

merge itself into du Pont, and the Government brief suggested the tax procedure to accomplish that.

Q. They suggested a tax-free merger of the two companies?

A. That is correct.

Q. Well, let me digress a minute. Was consideration given to such a merger of du Pont and Christiana on a tax-free basis at that time?

A. I understand that it was.

Q. It was not consummated.

A. It was not. Christiana was unwilling at that time to go out of existence.

Q. And do you know what kind of a price it paid to stay in existence?

A. Well, let me answer you in this way: All the consequences that we are talking about now in terms of benefits to Christiana would have been available to it then if

it had chosen to have the merger, and in addition, it would have saved somewhere in the neighborhood of 75 to 100 million dollars in taxes that it subsequently paid for receiving the General Motors shares.

Q. Are you privy to the reasons why Christiana did not elect to propose a tax-free merger?

A. I am not.

Q. Now, directing your attention to the Congressional

[689]

hearings, what was the position that the du Pont representatives urged in those hearings with respect to the proposed legislation?

A. Well, let me back up just one step.

As the case came out of the Supreme Court the Court said there must be divestiture in a ten-year period but du Pont is free to do it as it pleases. And at that point we reexamined our situation and worked out a three-pronged divestiture plan that we were prepared to follow in the event that remedial tax legislation was not obtained. And the plan essentially was this:

First, that instead of paying strictly cash dividends, we would pay out about 15 million shares of General Motors in dividends in lieu of cash.

Secondly, that we would set up an exchange program in which people could turn in their du Pont stock and get equivalent value in General Motors shares.

And, third, the expert guidance led us to conclude that if we ran those two programs we would still have to sell in excess of 35 million shares of General Motors in the market.

Q. Over what period of time?

A. This is over a ten-year period.

Q. Did du Pont urge that this modified divestiture program that you have just described would have an adverse

[690]

impact on the market value of General Motors stock?

A. We did. We went up on the Hill, testified both before the Committee on Ways and Means and before the Senate Finance Committee that by our estimate that plan would generate from 330 to 350 million dollars in tax revenues depending on values of General Motors shares over the period, and that the expectation was that the receipt of General Motors shares by our stockholders in lieu of cash dividends would precipitate them into the marketplace to get cash both for living expenses and their other uses they have and to pay taxes.

Q. What tax did you understand would be due upon the receipt of the General Motors shares distributed as dividends?

A. It would be treated as an ordinary dividend, it would be the ordinary income tax.

Q. I see.

A. The rate at that time was—went up to 81 percent, as I remember it. And I should add just as a footnote that we had done a survey of the stockholders and we knew that the average tax rates of our stockholders were in the range of 50 to 60 percent.

Q. So I interrupted you there. You were saying that you did urge that the program—the modified program would have an adverse impact first because of the dividends?

A. We urged that in both houses of Congress and various

[691]

experts testified as to how much of an impact it would have depending on various circumstances. Both committees of Congress were persuaded by the testimony.

The Antitrust Division of the Department of Justice ultimately supported the legislation, and President Kennedy was persuaded and signed the bill.

Q. Now, Mr. Shapiro, I would like to ask you based upon your knowledge, understanding, and participation in the du Pont position with respect to the General Motors divestiture, when you came to consider the proposal that Christiana and du Pont merge did you see any issues in the du Pont-Christiana merger that bore a similarity to those problems which you were facing in the General Motors divestiture?

A. None whatsoever.

[692]

Q. Would you explain why you feel the two situations are not comparable?

A. Well, let me say that as I saw it then and as I see it now, comparing these two situations, to me, at least, is comparable to comparing a BB gun to the hydrogen bomb. In the General Motors situation we had a compulsory order that controlled everybody's activity. People were not in a position to protect their own interests in the exercise of their own discretion.

The financial community to a man described the proposals that were being considered as unknown before in American financial history. And that view of the situation obtained all the way through the court. Judge LaBuy wrote an opinion to that effect; it obtained in Congress. And as I said, President Kennedy was persuaded enough to sign the bill.

The case we are talking about here this week it seems to me is just a totally different animal. There isn't any compulsion of any kind on anybody. Each investor is free to do what he wants to do to suit his own best

interests. No one is forcing him to take shares to the market. He obviously is not going to go to market and drive the price down because he is driving down his own values when he does it. So that it strikes me that the case we have before us here is the equivalent of what goes on in the American

[693]

business world every day of the week.

For example, I read in the paper this morning that the Dow Chemical Company had decided to have a stock split. I suspect, without knowing, that they did not have a market analyst come in and tell them what the market impact would be of a stock split. It is a commonplace occurrence.

Another item said that 8 percent of the shares of Alcoa were coming to the market in a secondary. Again, it is a standard kind of a business transaction. Whatever impact it has is temporary and local, and obviously doesn't have a long-term effect on the Alcoa Company.

Q. I take it from your testimony that in the General Motors divestiture matter the income tax consequences were an important factor in the forming of the position of the du Pont Company. Don't those same consequences obtain here?

A. They do not.

Q. Why is that?

A. If this exchange takes place under the terms that have been bargained out, the Christiana shareholders will turn in their shares of Christiana and have shares that have the name du Pont on it in place. They will assume for their du Pont shares the same basis they had for the Christiana shares. The transaction will be tax-free. There will be no need for them to raise capital because

of the transaction. They will simply wind up owning directly what

[694]

they owned indirectly, just as in the General Motors situation. The difference is simply that there you had a taxable transaction and here you have a tax-free one.

Q. Now, in reporting your recommendations to the du Pont executive committee and board of directors with respect to the du Pont-Christiana merger, did you feel it necessary or appropriate to warn the board of directors and executive committee members of the consequences of the General Motors divestiture?

A. I am not sure I follow you. Are you talking now——

Q. On your du Pont-Christiana matter. Did you——

A. Are you asking whether I felt it necessary to advise our people of the consequences of the General Motors divestiture in the early period?

Q. No, now. In connection with the du Pont-Christiana proposal.

A. Yes. But in connection with the du Pont-Christiana proposal I felt no sense at all in talking to our people about the market consequences of the General Motors divestiture. The two transactions are totally dissimilar.

Q. For the reasons you have just described?

A. That is right.

Q. Now, there has been discussion in this case of certain tax claims made by Christiana growing out of the General Motors divestiture. Are you familiar with those

[695]

claims?

A. Yes, in a general way.

Q. Was it necessary for you to form some judgment about them in connection with the proposed merger?

A. Yes, indeed.

Q. Are you familiar with the principle that is being urged by Christiana in making those claims for a refund in income taxes?

A. Yes.

Q. What do you understand that principle essentially to be?

A. Christiana received from du Pont three blocks of General Motors shares in the divestiture proceeding that finally eventuated. On each of the distribution dates it had to determine for tax purposes the value of the shares it received. It obtained the advice of Morgan Stanley and Merrill Lynch on the valuation question and used that as a basis—as I remember it, they used the average of the two sets of advice as a basis for filing their tax return. In arriving at the numbers which were used, the two financial houses went at it in terms of testing what the block of shares of General Motors would sell for on the distribution date given a willing buyer and a willing seller and cash as the consideration. They added to that the costs of the marketing, and that is how they came to their valuation

[696]

answer.

As I started to say before, Christiana used those answers in filing its tax returns, a dispute arose with the Internal Revenue Service over the matter, they paid the deficiency and sued for a tax refund. In the course of the litigation which ensued, both sides mounted their experts, and at this point in time the Government has three experts,

Christiana has two. Two of the Government experts said there wouldn't have been any market effect and therefore there was no justification for blockage which was the term that I understand the tax people use for this. The third Government expert made an analysis and determined that there would be some market effects but less than those determined by Morgan Stanley and Merrill Lynch, and the parties are haggling about how much the shares actually would have sold for on the particular days involved.

Q. In your approach to and consideration of merger terms between du Pont and Christiana did you see any application of this blockage principle that is involved in the Christiana tax case?

A. None whatsoever. We were not purporting to buy Christiana shares for cash; we were purporting to trade the underlying assets of Christiana for du Pont shares, and that essentially says we are trading du Pont shares for du Pont shares. It would have been silly in practical terms to

[697]

go through a routine of finding a market value for du Pont shares and apply blockage principles when we were expecting to transfer fungible paper.

Q. You end up transferring fewer du Pont shares than you receive back for cancellation, is that right?

A. 188,500, which in my book is a substantial number.

Mr. Gribbon: I should like to mark for identification as Applicants' Joint Exhibit No. 2 a communication from Irénée du Pont, the president of Christiana Securities, to Mr. C. B. McCoy, chairman and president of the du Pont Company, dated April 20, 1972.

(Applicants' Joint Exhibit 2 was marked for identification.)

By Mr. Gribbon:

Q. Are you familiar with the document that has been identified as Applicants' Joint Exhibit No. 2?

A. Yes, I am.

Q. Will you tell us what it is, Mr. Shapiro?

A. It is a letter from the president of Christiana Securities Company, Mr. Irénée du Pont, Jr., to Mr. McCoy as chairman and president of the du Pont Company, and it proposes examination of the question of whether the two companies ought to be merged.

Q. Was this communication, so to speak, the kick-off of the consideration of the merger?

[698]

A. Yes, it was.

Mr. Gribbon: I ask that Applicants' Joint Exhibit No. 2 be received in evidence.

Judge Ullman: Is there any objection? It is received.

(Applicants' Joint Exhibit 2 was received in evidence.)

By Mr. Gribbon:

Q. Mr. McCoy promptly brought the letter of April 20 to your attention and to that of the other members of the executive committee, did he?

A. Yes, indeed. As I remember it, he advised me promptly after he received it, and at the next meeting of the executive committee he advised the committee as a committee.

Q. Did you, Mr. Shapiro, read Mr. Irénée du Pont's letter of April 20 as an indication that there would be substantial sales of du Pont stock by the Christiana share-

holders following a merger if the merger were to be consummated?

A. Of course not.

Q. Why not?

A. Mr. du Pont was speaking for a group of people who have devoted their lives to the building of the du Pont Company over the years. Their predecessors, their ancestors.

[699]

It is hard to think of any group who had a greater attachment to the du Pont Company than this group of members of the du Pont family. And it was inconceivable to me that they had some intention on April 20th, 1972, to suddenly liquidate their interest in the du Pont Company, one that had gone on for 170 years, and move to something else.

And so one had to look at this and say what is going on, and when you answered that question you couldn't convince yourself by any stretch of the imagination that the members of the du Pont family wanted to get out of the du Pont Company.

Q. Did you have any other basis for your belief as I believe you have just stated, that substantial sales of du Pont stock were not contemplated?

A. Well, there are a number of ways of dealing with that. In the first place, it seems to me fundamental, given the integrity of the man involved, that if they had any interest in moving du Pont shares to the market place, that would have been disclosed immediately.

I truly can't conceive of men of this quality having some underhanded scheme to market shares in the market place without disclosing it to the management of the du Pont Company.

So that is a starting point, it did not occur to me at all that this would happen.

[700]

I must say that in the light of my General Motors experience, the subject of market impact passed through my mind, but I dismissed it as not a serious consideration.

Q. Were any inquiries made, to your knowledge, as to whether substantial sales were in contemplation?

A. Yes, indeed. It was not enough that I was convinced in my own mind that this was not some secret, diabolical plan. Promptly after our executive committee appointed a negotiating committee we convened a meeting of all the counsel, the financial—not the financial people, the in-house financial people, but at that point we did not have outside financial advisors involved. And I sat in on the meeting. It was on April 28. And each side came to the meeting with a list of items that it wanted to get on the table to be sure that various kinds of work were undertaken to proceed with the examination of the question. And one of the questions that was discussed at that time in a formal way was whether there was any basis for expecting that this was a liquidation of the du Pont family interest in the du Pont Company. And at that meeting, Mr. Gemmill, speaking for Christiana, was quite explicit on the point that it was not. And as I remember it, when the SEC experts around the table started talking about various ways of dealing with possible sales, he assured them that it was an academic question: there was no interest

[701]

on the part of his clients in moving out of the du Pont Company.

There were subsequent developments, but that was the first step.

Q. This April 28th meeting which you attended was not a meeting of the negotiating committee of the two companies?

A. No. No, quite the contrary. This event developed unexpectedly from my standpoint, and I had plans to be abroad beginning the first week in May, and I wanted to be sure that we got the staff work moving while I was gone. So we assembled everybody in Wilmington to see how we could block out the various assignments that needed to be undertaken. And as I remember it, we had acted on Wednesday of that week, this was a meeting on Friday morning, and the Christiana board was to meet that afternoon to take action from its standpoint.

Q. You were the only one of the negotiators present at that meeting, is that correct?

A. That is correct.

Q. Did you during the course of the consideration of the Christiana merger talk directly with any of the directors or major stockholders of Christiana?

A. I assume you mean about the merger?

Q. About the merger, yes.

A. No.

[702]

Q. Was that by design?

A. This is by design. Counsel on each side advised the parties to not carry on discussions between themselves but to work through counsel on the premise that even though everybody knew each other, it was preferable to make this as much an arm's-length negotiation as we possibly could under the circumstances.

Q. Leaving aside the meetings that you subsequently had with the special negotiating committee of Christiana, did any member of the Christiana board or any major

shareholder ever suggest to you in any way what he thought the right terms for this merger should be?

A. No.

Q. Back now to the possible impact on the market value of du Pont shares as a result of consummating the merger. Was that subsequently discussed with your financial advisors?

A. It was. Both with Morgan Stanley and First Boston.

Q. And what was their advice?

A. Neither company saw any serious or prolonged market impact. I think both recognized that there could be situations from time to time, depending on the number of shares that people might want to sell, where you could have a dislocation for a few days, but nothing that would have any permanent or lasting impact on the stock.

[703]

Q. Now, directing your attention to the occasion in mid-July when the merger was presented—the merger terms were presented to the board of directors of the du Pont Company and on which occasion they received tentative approval. What discussion was there at that meeting of any possible impact on the market value of the du Pont shares?

A. Let me back up one step again.

Prior to that meeting—well prior to it, we sent to all of our directors the reports of the three financial houses so that they could be studying the financial data and have their own understanding of the transaction. Two of those reports, as I remember it, addressed themselves to the question of market impact.

At the directors' meeting itself, my recollection is that I made a brief presentation of the merger proposal from a series of notes I had jotted down on a yellow pad, and my

recollection is that I simply went through the various financial analysts' documents and jotted down titles to remind me of things to talk about. And I would assume, although I have to concede that I don't have a very clear recollection of it, that the market impact discussion in the Kidder, Peabody and the Morgan Stanley report was mentioned. It did not—in any event, the subject did not generate any degree of interest among the directors.

Q. Was it in your own conception of the transaction

[704]

a factor that deserved prolonged discussion?

A. Not at all. I think it was a de minimis item.

Q. If there had been discussion of the possible market impact at the board meeting, would it have been normal for the minutes of the board meeting to have reflected such discussion?

A. No.

Q. Why not?

A. The minutes would have simply reflected that a presentation was made with respect to a proposed merger with Christiana Securities Company, and they would show a resolution adopted by the board.

Q. Following tentative approval, or approval in principle by the board of the merger terms in mid-July, did you make any subsequent re-examination of this question of possible impact on the market value of du Pont shares?

A. We had another round in this connection with Mr. Gemmill. And again I am not sure whether it was a discussion between myself and Mr. Gemmill or whether it was between Mr. Grimes and Mr. Gemmill and Mr. Grimes told me. But in any event, I had been advised by the end of July that the matter had been seriously canvassed and there was no plan, secret or otherwise, in the du Pont family to move out of the du Pont Company and their

holdings of du Pont shares. That is where it stood until the proxy material was prepared.

[705]

And in that connection, Mr. Gemmill's people worked very carefully for a long period of time with Mr. Grimes and his staff, and I saw drafts of proxy materials. There was no indication in any of that proxy material of any plan to dispose of shares.

I know Mr. Gemmill well enough as a lawyer to know that if his clients had any such plan he would have insisted that the proxy material reflect the plan. Otherwise, the exposure of his clients would have been enormous.

Q. Were there particular passages in the Christiana proxy material that led you to the conclusions you have just expressed with respect to possible sales?

A. It was not that there were passages that dealt with the subject. It was the absence of language that persuaded me that what I had heard before was accurate.

I would have assumed, just as a matter of being a good set of lawyers on the other side, that Mr. Gemmill and his associates, who had worked very diligently in preparing the proxy material, would have insisted that their clients disclose any plans that they had. Otherwise, as I said, their exposure in terms of dollars is unbelievable.

Q. Were you aware that the Wilmington Trust Company was the holder of a substantial portion of the Christiana shares?

A. I came to find that out at some point along the

[706]

way. I had not known it or focused on it in the early stage of this affair.

Q. Were you advised at any time as to the intentions of the Wilmington Trust Company, if any, with respect to the du Pont stock that would be received in the merger?

A. Yes. Again the advice came directly or indirectly from Mr. Gemmill, and in this case I think it came directly, that he had consulted with the Wilmington Trust Company and that they had no plans to liquidate their holding of du Pont stock, either the shares they now held or the shares they would get in the merger. Subject, as Mr. Grimes indicated, to whatever requirements they faced in their fiduciary capacity.

Q. Following the meeting of the board of directors of the company in July, was there a subsequent occasion on which the possible impact on the value of du Pont stock as a result of the merger was discussed?

A. At the board level, I take it you mean.

Q. Yes.

A. Yes, indeed.

Q. What was the occasion for that discussion?

A. Well, let me start this way: each month at our board meeting Mr. McCoy had a practice of having the—he advised the board on the current status of negotiations and plans depending on the various stages. There came a month

[707]

in which I had to advise the board that objections to the proposed merger terms had been filed with the SEC, and I did, and the board had a good deal of curiosity as to the nature of the objections and who the people were who were objecting. And we had a rather fulsome discussion of the subject at that time. I think it was the November meeting.

Q. And what was the essence of your report to the board on the occasion of that meeting?

A. I told the board that I had read the objection of Mr. Murtaugh; that I had re-examined the subject of market impact in the light of the facts we had, in the light

of the financial advice we had, and that in my view the objection was frivolous.

Q. Was there any dissent from the view you expressed?

A. There was a fair amount of discussion as to why Mr. Murtaugh was raising the issue and why Mr. Collins had raised an objection, and I expressed views as to that which I would prefer not to deal with today.

Q. Was there any member of the board of directors who expressed any difference from your assessment of the matter?

A. Not at all.

Q. Are you generally familiar with the proposed proxy statement that has been marked in this case as du Pont Exhibit 5?

[708]

A. As I said, I read it—read drafts when it was being put together, and I read it when it was finished. I have a general familiarity. I would not purport to be able to tell you what is on each page.

Q. Have you any reason to believe, Mr. Shapiro, that in connection with this matter of possible market impact that there is any failure to state a material fact or any misrepresentation in that proposed proxy statement?

A. Obviously not. Otherwise we would have put it in. But let me add, if, for example, the staff of the Securities and Exchange Commission had a comment on this subject, they said we think you are wrong, you ought to say something about it, then it would be added.

The point of the proxy material is to tell the stockholders as much as we can about material facts so that they can make an informed judgment. We have no desire to hide from the stockholders any fact.

Q. Based upon your knowledge, you don't feel that there is any materiality as of this time in talking about the market impact of this merger?

A. In my view it is a Murtaugh effect and is de minimis consideration.

Mr. Murtaugh: I didn't quite get the—would you repeat that answer?

The Witness: I said in my view it is a Murtaugh

[709]

effect and a de minimis consideration.

By Mr. Gribbon:

Q. Do you consider that the proposed merger with Christiana on the terms that have been agreed to and submitted to this Commission is in the best interest of du Pont and of the non-Christiana shareholders of du Pont?

A. I am absolutely convinced of it. Without any reservations.

Q. Would you explain the basis for the view you have expressed?

A. There has been a good deal of testimony all week about benefits to either side in this transaction, and there is not much point in repeating what everybody else has said.

I would prefer to deal with what appeals to me as the central consideration from the du Pont standpoint, and that is the dispersal of a block of 28 percent of du Pont stock in the hands of Christiana. And I say that with a fair amount of diffidence, because, as a matter of history, Christiana has contributed greatly to the success of the du Pont Company over the years. Men such as Pierre S. du Pont, Lamont du Pont, Irenee du Pont, Walter S. Carpenter, Jr., Lamont du Pont Copeland, Crawford H.

Greenewalt have all been giants in building the du Pont Company, and they have also been connected with Christiana. So that as a matter of history, the contribution is enormous.

[710]

When you look to the future, however, it seems to me we have a totally different picture. And I think this must have underlain the consideration of the Christiana board when Mr. du Pont's letter was written.

As these men, some of whom are now gone and others who are now in the latter years of their lives, looked to the future, it strikes me that they must have asked themselves who is going to be managing Christiana in the years to come and what skills do they bring to understanding the chemical industry and the du Pont Company. And having examined it that way, I suspect they must have concluded it is unwise to deal with uncertainty for the future. But whatever their thinking may have been, from my standpoint the critical consideration for the future of the du Pont Company—and I am talking about those who follow us in management, rather than the current management—is that there not be a block of 28 percent of du Pont shares in hands of people who have no familiarity with the chemical business and with the du Pont Company in its detailed operations.

And it is the elimination of that kind of an uncertainty for the future which seems to me so overbearing in importance that the merger is the greatest news that I can think of for the du Pont Company.

Q. Aside from the effect or possible effect on the management of the du Pont Company as you have described,

[711]

would the continued concentration of this 28 percent block pose any sort of threat to the value of the balance of the du Pont shares?

A. If you let your imagination run, you can conceive of situations in which it might. All that I am saying today is that I don't know what the future will bring, and I think it is part of my duty as a senior vice president of the du Pont Company to do whatever planning I can to avoid unforeseen risks of this kind in the future.

Q. You do understand, do you not, Mr. Shapiro, that there are significant financial benefits that will flow to the stockholders of Christiana if the merger is consummated?

A. I understand they will get—they will hold directly the du Pont shares they now own indirectly and that is an advantage to them. Just as in another context we regarded our stockholders as having an indirect interest in General Motors.

Q. And made every effort to try to get those shares to them on a tax-free basis.

A. That was the point of my comment earlier; that we devoted many of our lives and our resources to trying to assist those stockholders at that time to get directly what they held indirectly without having their assets confiscated.

Q. You are also aware that upon consummation of the merger there will be an elimination of the present

[712]

inter-corporate dividend tax that Christiana pays?

A. Yes, indeed.

Q. Which would be a financial benefit to the stockholders?

A. It would.

Q. Now, in approaching the matter of merger terms, did you—or do you believe that you were entitled to demand on behalf of the non-Christiana shareholders of du Pont a substantial participation in these benefits?

A. The answer is no.

Q. What is the basis for that answer?

A. As I indicated before in connection with the discussion of the General Motors shares, I would come to this situation the same way. As a director of the du Pont Company, I would regard myself as having a fiduciary duty to all of our stockholders. In this case there are two classes: one, Christiana, and the remaining shareholders. And it seems to me that my object in management is to see to it that the interests of the du Pont Company are protected. To the extent that I can facilitate the stockholders of Christiana getting directly what they own indirectly, I think that is a benefit ultimately to the du Pont Company as well. But primarily, my concern would simply be that if their interests are to be facilitated, it ought not to be at the expense of the du Pont Company and its shareholders.

[713]

Q. Did the financial advice that you sought from two different advisors alter your view as to the propriety of the non-Christiana shareholders attempting to participate in these benefits to flow to Christiana shareholders?

A. No, it confirmed it. What we did essentially was to first of all bring to it a businessman's viewpoint of the transaction and then seek to get the best financial advice one could get and the best legal advice we could get to test what our own thinking was in terms of, A, being able to get the appropriate tax ruling, and B, being able to

get the appropriate exemption order from the Securities and Exchange Commission.

Q. Did the legal advice alter your view as to participation in those financial benefits?

A. No. It confirmed it.

Q. In your view, sir, was the merger sufficiently advantageous to du Pont that you would have favored it even if there were no immediate financial benefit to the non-Christiana shareholders of du Pont?

A. Yes, indeed. As I tried to say earlier, I regard the dispersal of the block of stock as of enormous value to the du Pont Company and its stockholders, management and employees of the future. The question of the discount is one of these fringes that becomes necessary in order to be able to demonstrate values. If I could put a dollar

[714]

value on the dispersal feature, I think the discount would be an academic matter. But since people—and here I really am thinking of many of our employees who have no grasp of management in this sense, no grasp of the importance of getting this block dispersed—those people would not understand clearly why this kind of a transaction was being entered into, and so I gather this is customary in these transactions, and we did it here. We negotiated an inducement factor to demonstrate to people that there is a dollar value in addition to this other value I have been talking about.

Q. In your consideration of the merger, what assumption, if any, did you make as to whether there were available to Christiana alternative methods by which it could get its du Pont holdings directly into the hands of Christiana shareholders?

A. I started and I remained with one basic assumption: that Christiana does not have to have a merger unless

it can get terms that are satisfactory to it. It can continue to stay in business as it has for 50 years. And all the talk about other alternatives was totally unimpressive to me.

From our standpoint, we were anxious to have the merger for the reasons I have outlined, and I didn't want them to change their mind and decide they wanted to stay in business.

[715]

Q. There has been considerable testimony and reference in the advisors' reports to the possibility that Christiana might be able to utilize Section 333 of the Internal Revenue Code to distribute its holdings of du Pont stock to its shareholders with relatively modest tax as these matters go, $30 to $70 million. What did you understand to be the significance of that possibility in the negotiations? What part did it play?

A. Well, 333 was suggested I think initially by the Christiana people as a possible alternative that they had. We considered it, and the more we considered it the less we thought of it as a realistic alternative. And we finally concluded it was a bargaining ploy being used for the purpose of keeping the discount as low as possible.

We satisfied ourselves in our own thinking that the mechanism of 333 which involved getting consents from 80 percent of the outstanding stockholders on an individual and corporate basis was an impractical mechanism with a company involving 8,000 shareholders, and through the work of the tax lawyers on both sides it became evident after a while that there were insoluble tax problems until you actually had such a distribution and the IRS went after the recipient of the stock and tried to assess additional taxes. Then the problems could be resolved in the various judicial tribunals.

[716]

Under those circumstances, we dismissed it as a serious matter, and I am clear in my recollection on this: that the very first item at the first negotiating session I leaned across the table and asked for an admission from the other side that they were abandoning 333 as having any significance, and I got the admission.

Q. What effect did the elimination of 333 as a feasible alternative have upon the terms that du Pont suggested to Christiana?

A. We had agreed among ourselves, that is, Mr. McCoy and myself, on the terms that we wanted to bargain for. The number was higher than the top of the range suggested by Morgan Stanley, which had been a joint advisor to the two companies. It was higher than the top of the range that Kidder, Peabody had announced at the June 30 meeting. And we were anxious to destroy the 333 argument so that we could justify getting a higher discount as a part of the bargain.

Q. By the way, there have been some suggestions made in examination of the financial people that they are not going to be paid unless this merger goes through. Will you state the du Pont Company's position with respect to the payment of those financial advisors?

A. In our 170 years we have never gotten anything for free and we don't expect to get it from these people.

And I would add the lawyers to that category.

[717]

Q. In your merger negotiations, Mr. Shapiro, what consideration did you give to the market value of Christiana shares?

A. We were conscious of it, but it was not a factor in considering the merits of the deal that was being negotiated.

Q. Why wasn't it a factor?

A. We were not interested in buying Christiana shares as that. We were interested in getting du Pont shares and returning du Pont shares.

Q. Are you now or have you at any time been an officer or director of Christiana?

A. Never.

Q. Do you own stock in Christiana?

A. No.

Mr. Gribbon: I would like the record to show at this point, Your Honor, by reference to pages E-1 and E-3, which relate to the holdings of du Pont directors, that Mr.—this is of du Pont Exhibit 5, I am sorry—that Mr. Shapiro has a significant equity interest in the du Pont Company and no interest in Christiana.

By Mr. Gribbon:

Q. Is it your considered judgment that the terms that have been agreed to for the merger of du Pont and Christiana are fair and reasonable to the du Pont Company

[718]

and to the shareholders of du Pont other than Christiana?

A. It is, and I would include in that category the employees of the du Pont Company.

Q. Have you in negotiating this merger on behalf of du Pont been motivated in any respect by a desire to confer benefits upon Christiana shareholders?

A. No.

Q. Do such benefits as may flow to the Christiana shareholders as the result of the consummation of the merger constitute any disadvantage, financial or other-

wise, to the du Pont Company or to its shareholders other than Christiana?

A. They do not. And let me say again that if I could find any significant disadvantage—well, I will withdraw the word "significant." If I could find any disadvantage to the du Pont Company from this merger, I would not be supporting it.

Mr. Gribbon: No further questions, Your Honor.

Judge Ullman: Mr. Collins, do you have questions?

Mr. Collins: Yes, Your Honor.

Judge Ullman: Will you proceed.

CROSS-EXAMINATION.

By Mr. Collins:

Q. Mr. Shapiro, does the Christiana Securities Company control du Pont Company?

A. Would you tell me what you mean by control?

[719]

Q. I am simply asking you, in your opinion, does it control—

A. Mr. Collins, the problem is this simple: everybody all week has used the word "control" as though it was a word with a fixed meaning. I suggest to you that control is a fluid word with many meanings under different circumstances. I am prepared to answer your question if you tell me what you mean.

Q. Well, sir, in last year's proxy statement sent out before the last annual meeting, I believe that there was a statement in that proxy statement to the effect that the du Pont Company denied that the Christiana Securities Company controlled it. Are you familiar with that?

A. Yes, indeed.

Q. Now, do you support that statement?

A. I do. I approved it before it went out.

Q. Now, when the du Pont Company first contacted The First Boston Corporation to represent it in this merger negotiation, was there any discussion of what fee The First Boston Corporation would receive?

A. Not that I know of. I was not present, but I would be surprised if there was. We assumed we would pay a fee, and we know that investment bankers do not come cheaply.

Q. Do you believe that it is good business practice

[720]

to enter into a transaction before you know what the cost of that transaction and what the cost of those services are going to be?

A. It depends on the transaction you are talking about. If I am going to buy merchandise for my plant, of course I have to know the cost. If I am going to retain a lawyer, I very seldom ask him to name the fee before he performs his service.

Q. About 20 years ago I believe that the du Pont Company had a policy that the company could not engage in any transaction that was going to cost more than $300,000 without the express approval of the finance committee. Are you aware of that?

A. No, sir.

[721]

Q. At the present time—

A. I am sure that there was a policy that defined jurisdiction between the executive committee and the finance committee with respect to capital appropriations. But I don't know of the policy you have described.

Q. Then do I understand you to answer my question that if you were going out to buy some equipment or to buy a plant, you would understand clearly before the deal was consummated that you would know what you were going to pay for it?

A. What I said was if I were going out to buy raw material for my plant, I would want to know the cost of the raw material before I bought it. I distinguished that from buying services of professional people and said if I were going to retain a lawyer it would be very unusual for me to ask him about his fee before he performed his services.

Q. Yes, sir.

A. And I stick with the same answer.

Q. Now, when the du Pont Company engaged Morgan Stanley to advise it in this merger negotiation—and you were among those who selected Morgan Stanley?

A. Yes, indeed.

Q. Were you aware of the long-standing relationship that Morgan Stanley had had with the du Pont Company?

A. And with Christiana.

Q. And did you believe that Morgan Stanley had made a

[722]

good many profits as the result of this business relationship with du Pont?

A. I certainly hope so. I wouldn't want anybody to do business with du Pont and not make a profit.

Q. And do you believe that it was better to engage a firm that had had this long-standing relationship and had made these profits with du Pont—it was better to select that firm than to select a firm that had had no business relationship with du Pont in the past?

A. No, I wouldn't put it that way. I believed that it was important to have the financial advice of Morgan Stanley because we had a high regard for their competence in the financial field. But I also believed that given their historic relationship with both companies, it was prudent for the du Pont Company to get financial advice from another financial house of equal competence who had had no prior ties with either company. And that is exactly what we did.

Q. Now, did you have any occasion to believe that Morgan Stanley might be influenced in giving its recommendation as to the terms that Morgan Stanley would be influenced by the stockholdings of the board of directors in Christiana?

A. Not at all. I think that I was sensitive to their difficulty in trying to come up with an opinion that would be fair to two clients both of whom had had relationships with them over the past. And I think that we had confidence that

[723]

they were people of integrity who would express their views in the most honest way they could, and we wanted their views because of their prior history with us. Nevertheless, we also wanted a check against that from a good financial house that had no prior contact with us or with Christiana just to be sure that we had the best advice that we could before we made our decisions.

Q. Assuming that Morgan Stanley had made a report recommending that the merger take place on the basis of a discount of 10 percent from the net asset value of Christiana, would that have altered your view toward any future dealings with Morgan Stanley?

A. I don't think so. It would seem to me that when you hire an expert you want his best informed, honest

judgment, and you don't impose sanctions on him if he doesn't tell you what you don't want to hear. Let me say it the other way: If he tells you something you don't want to hear. Only a fool would treat an expert that way.

Q. Going back to your testimony of about an hour ago, I believe you described the letter that came in from Mr. du Pont as the kick-off of the negotiations? That is on Applicants' Joint Exhibit No. 2?

A. That was the kick-off of the work that began. As a result of that letter, our executive committee designated a negotiation committee and I organized a staff to do the

[724]

necessary work to let us be informed on whether we should go forward to a final agreement or not.

Q. Now, do you know of any negotiations orally that took place before that letter was received?

A. I do not. I suspect there were none.

I assume you mean in the time period here, April 20, 1972.

Q. Yes. The letter was dated April the 20th, 1972.

A. Yes. All I am saying, Mr. Collins, that I am sure there must have been discussions back in 1961 when the Government had suggested the merger. I didn't mean to encompass that.

Q. No, sir.

A. All right.

Q. I am speaking of, say, within the preceding two to three months before April the 20th, 1972.

A. I know of none.

Q. Now, when you were first advised of the receipt of this letter, April the 20th, 1972—when you were first advised of that letter, did you have any opinion yourself as to what terms the merger would take place on?

A. No, not in that sense. The question of a merger was not fresh to my mind, but I hadn't focused at that point on what I thought were good terms, and certainly we didn't have financial guidance at that time.

[725]

Q. How were the negotiating committee of du Pont selected?

A. As I indicated, the committee was appointed by the executive committee. I think, as I remember the meeting, Mr. McCoy advised the committee of the letter from Mr. du Pont and recommended that it was worth consideration and suggested that a committee composed of himself and myself be designated for the purpose of carrying on the negotiations. And the committee so acted.

Q. Now, on the present board of du Pont there are I believe two members who would be considered outside directors?

A. Yes.

Q. By outside——

A. Yes, I understand you.

Q. All right. Now, was any consideration given to putting those outside directors on the negotiating committee?

A. I don't know. The suggestion was made by Mr. McCoy that he and I be the negotiating committee, and that is how the executive committee responded. It seemed to me a perfectly sensible use of manpower in terms of my background and in terms of his responsibility as president of the company.

Q. Do I understand you to state that you understand these outside directors were not considered?

A. I said I don't know what was in Mr. McCoy's mind.

[726]

Q. Now, did the board on the receipt of this letter—did it consider the possibility of having the du Pont Company merge into the Christiana Company?

A. No. Not that there was any objection to it, I suspect, if it had been raised. It simply wasn't proposed as a convenient form for conducting the transaction.

Q. Now, in the course of time, the du Pont Company has acquired treasury stock. Is that correct, sir?

A. Some, yes.

Q. Now, will you tell me the procedure that the du Pont Company follows when it acquires treasury stock?

A. Well, the treasury stock that we have at present, as I understand the situation, was purchased in the open market in connection with contingent liabilities under the Endo acquisition. It turned out that the liability did not come to fruition, and so the stock was unnecessary for use.

Q. What is the procedure followed in acquiring the treasury stock? Does the board of directors set a price at which it will acquire it, or does it leave that in the discretion of the brokers?

A. It was left—well, I will have to speculate, because I am not really familiar with the details. But I suspect it was under the direction of the treasurer of the company.

° ° °

[732]

° ° °

Mr. Collins: It states September the 30th, 1972.

Mr. Gribbon: If Your Honor please, I might cut this short. Mr. McCoy will be a witness and will be prepared to explain all of the circumstances surrounding this substantial disposition of 40 shares.

Judge Ullman: Mr. Collins, you may proceed.

Would you happen to know, Mr. Shapiro, how he disposed of his 40 shares?

The Witness: I do not know, Your Honor.

By Mr. Collins:

Q. Mr. Shapiro, the report of The First Boston Company, among other things, stated that in this merger the du Pont Company should not seek any other advantage other than necessary to obtain stockholder approval to this merger. Do you agree with that?

A. As I have said, I think the great advantage to the

[733]

du Pont Company is the dispersal of a block of 28 percent. The other items are fringe benefits that are also important and nice to have, but the crucial advantage is the dispersal of the block.

I read what First Boston said, I have my own views of what is important for du Pont.

Q. Well, now, I believe you testified earlier that it would be very difficult to put a dollar value on that aspect of it.

A. That's right. I don't know how to put dollars on that kind of a consideration.

Q. Now, translating into my own words your opinion on that aspect, are you stating that it is simply beyond the minds of many of the employees of du Pont to understand that factor?

A. No, I don't want to be misunderstood that way.

What I am saying is that to the man working in a plant who has no experience with corporate management, talk about dispersal of a block of stock is not going to be as meaningful as it will be to people who are experienced in this area. And a man like that will pay, I think, greater

attention to dollars than he will to what in my view is the more important consideration.

• • •

[737]

• • •

Q. During your earlier testimony I believe that you stated that the Christiana Company had contributed greatly to the success of the du Pont Company over a period of years.

A. I said that the men who ran the Christiana Company had been the builders of the du Pont Company. And I named them by name.

Q. Yes, sir. But did you state that the Christiana Company had contributed to the success?

A. I don't think I did. And I didn't mean to in that sense. I think Christiana holding a block of stock in that period was a contribution, but my point of emphasis was the contribution made by the men.

Q. You stated that in your view, that the Christiana Company does not have to have a merger at the present time.

A. I think it is a matter of their free choice. That is true for both sides.

Q. Now, when you say that they do not have to have a merger, are you speaking in a legal sense or are you speaking in an economic sense?

A. I am speaking in a practical sense.

They are free to make their own choices. There isn't any order that forces them out of existence such as you had under the Public Utility Company Act. This is a free

[738]

business situation. They can make whatever judgments suit their best interests.

Q. Now, you are speaking, then, in a practical sense.

A. Yes, sir.

Q. Now, did I understand you to state that since the General Motors divestiture, at which time the Department of Justice suggested a merger, that Christiana had declined to merge and it incurred taxes in the millions of dollars?

A. That is right. I said they incurred taxes in the range of 75 to 100 million dollars on the GM divestiture, and they gave up the opportunity to escape the intercorporate dividend tax and th costs of running their operation, and also to get du Pont shares held directly.

Q. With the Federal income taxes being a fact, do you state that in a practical sense that Christiana is under no pressure to merge?

A. I state that without qualification. They have lived with the tax that they pay for the life of the tax and it doesn't seem to have bothered them at all.

Q. But people can live with a burden, but the burden is still a pressure, wouldn't you say?

A. All I can do is speculate on what goes into their thinking, and they seem not to have regarded it as much of a burden. Otherwise, I would have thought they would have made the move back in 1961 and saved a fortune in tax dollars.

• • •

[744]

• • •

CROSS-EXAMINATION (Resumed).

By Mr. Murtaugh:

Q. Calling your attention to page 2 of Murtaugh's Exhibit No. 4, I direct your attention to the table, the first table on page 2. I see listed there 69,216 shares of Wilmington Trust Company common. Do you see that?

A. I do.

Q. A carrying value of $903,592. And what is described as a market value of $2,837,856, approximately a little over three times the carrying value. You note that, do you?

A. I note that.

Q. Yes. You will note the asterisk right after that—double asterisk, I should say, right after that last figure. Would you read what the asterisk says, please?

A. The double asterisk reads as follows: "Based on closing bid price in local OTC market—but that may not be the realizable value of such a large block of stock."

Q. Now, the holdings of Christiana in the Wilmington Trust Company constituted about, according to information here or elsewhere, 3.45 percent of the outstanding shares. Do you recall that circumstance?

A. I have heard the number mentioned.

[745]

Q. Despite the fact that this was stated to be a large block of stock, it was thought wise to state that such value might not be realizable. Is that correct?

A. I think it was thought wise—it was thought prudent to save the point until the matter could be investigated.

Q. It was the intention in this merger to sell the shares of Wilmington Trust Company.

A. That's right.

Q. The asterisk called attention to the fact that market value unless properly understood might be a misnomer. Is that correct?

A. I don't read it that way.

Q. How do you read it?

A. I read it just as the words were quoted, as saying that the calculation was based on the closing bid price in the local over-the-counter market. But the author was

saving the question whether that much could be realized if all the shares were sold at one time on a given day.

Q. Do you think it is—if you were able to sell it over a period of a month or two at that price that it would be pretty good execution?

A. I don't know. This is a question I would put to financial advisors, and I think that is all the author had in mind when he saved the point.

Q. Now, I have taken the definition of "market value"

[746]

from Webster's New Unabridged International Dictionary, Second Edition.

Econ—that stands for economy, I presume. The price which a man can expect to receive; the average value of a commodity in a given market during a short period of time, as distinct from normal value, which can be found only by observing very long periods.

Do you have any quarrel with that?

A. I have no view of it at all. That is what the dictionary says.

Q. The same dictionary defines market price. The abbreviations right after that for it are econ. and com., which I take it mean a term used in economics and commerce. The definition is as follows: The price actually given in current market dealings; the price at which the supply and demand are equal. Do you accept that definition?

A. It sounds sensible to me as a general premise.

Q. Does the asterisk reflect the fact that the so-called market value is merely the quoted value of a relatively small amount of normal sales at a particular time?

A. The asterisk denotes the fact that the number, namely $2,837,856 is based on a closing bid price in the local over-the-counter market, period.

Q. Now going up the table to the 13,417,120 shares of du Pont common stock, where the carrying value is said to be

[747]

$74,621,915 and the market value is stated as $2,222,210,-500. There is an asterisk there too, isn't there?

A. Yes, there is.

Q. Could you read what that says?

A. It reads as follows: "Based on NYSE closing prices —but this may not be the realizable value of such a large block of stock."

Q. Except for the reference to the New York Stock Exchange and the over-the-counter markets, the same——

A. It is the same concept.

Q. Same concept, yes.

Do you believe that statement is true, that that wouldn't be the realizable value of that?

A. Which statement?

Q. $2,222,210,500.

A. I would have a very firm guess that if anybody tried to market 13,417,000 shares of du Pont on a cash sale on one day, that number would not be realizable. You would have blockage effects.

Q. What is the significance—on any particular day, let's say the average sales of du Pont might be 6,000, 7,000 shares. Isn't that roughly speaking true?

A. It ranges from 50,000 to 90,000 shares a week, depending on circumstances.

Q. How do you justify relating any value in this case

[748]

to the quotation for individual shares traded in relatively small amounts with reference to the 13 million shares?

How do you justify taking that as a valuable concept in this context?

A. I don't. I haven't attempted to.

Q. I am referring——

A. I have asked financial analysts to give me their best advice as to how to value these assets and they have done that.

Q. This was before you had the benefit of the financial analysts.

A. That's right. This document was prepared by Mr. Grimes simply as a quick summary of relevant facts that would inform management people in du Pont of the nature of this kind of a transaction. I have no quarrel with it even though I didn't see it until after it had be issued.

Q. Well, now, carrying down to the next table on page 2, we see the same figures more or less summed up and added to with an additional—I guess the only difference is they added the cash and the federal tax claim to the sums above. Is that correct?

A. On a quick reading, that is what it looks like.

Q. Now, the asterisk has disappeared, hasn't it, now, and the thought that this may not be realizable?

A. There is not an asterisk on those numbers. You

[749]

are correct.

Q. And more or less continuously on through the papers that this is restated in, that matter is not called to the attention again that this is not a realizable value, such a large block of stock, is it, to the best of your knowledge?

A. The paper speaks for itself. Whatever it says it says.

Q. Is it an attempt to substitute a concept of value here by the use of phrases like market value when it couldn't possibly be marketed at that value?

A. The paper says that if you calculate 13,417,120 du Pont common shares by the market value at May 1, '72, that is the quoted price in the market, you will get this kind of a sum. I do not read it as saying that anybody can realize that amount of dollars in cash by selling the shares at that price. I have difficulty believing anybody in our organization who read this was confused by what it says.

Q. In the notes to financial statements—I am now looking at something called C-19, Notes to Financial Statements, Christiana Securities Company.

Mr. Gribbon: That is the proxy statement, du Pont Exhibit 5. Do you have that?

Mr. Murtaugh: You will have to help me out.

[750]

The Witness: I don't think I do.

Mr. Gribbon: Go ahead, he can follow.

By Mr. Murtaugh:

Q. The accountant who I suppose is professionally more exact, in referring to the total of the net asset value of Christiana—of the du Pont shares owned by Christiana, in place of the heading "Market Value" puts shares owned times price per share.

A. Yes, I see that.

Q. And the second paragraph down from that table he puts the amounts computed as above are not represented to be the aggregate quoted market or realizable values of the respective investments. Do you see that?

A. I do.

Q. Do you think that—you don't believe that there is sort of a thought transference here involved in the continual reference to market value with reference to what is

merely the sum of the current quoted price times the number of shares outstanding?

A. What I believe is that the document that Mr. Grimes prepared said to our management people if you calculate the number of du Pont shares that Christiana owns times the price in the stock market on May 1, 1972, you will get the number $2,222,210,500, and there is a footnote that says don't be sure this is the right number because it may not be realizable.

[751]

Q. Correct.

A. I don't think there is any ambiguity at all about it.

Q. You have no question but it is not realizable, do you?

A. In my judgment, as an amateur financial man, it is not realizable if you take all the shares to market on one day.

Q. Now, why do you think, then, that we should—especially—you are familiar with, of course, the market price was ticking at 146 I believe for Christiana the day of the announcement, and the other was 164 for du Pont.

Do you have any idea why the market value wasn't assigned to Christiana shares in this table?

A. I do not.

Q. It says on page 3 the trading volume in both issues, namely the common and preferred, of Christiana is quite limited.

You have heard testimony here by witnesses adduced by the applicants for exemption that the market price of Christiana is—compared to similar securities fully represented its value comparably. You heard that evidence?

A. I heard testimony. I won't quarrel with your characterization.

Q. Going down——

[752]

A. I didn't think that the words said what you quoted, however.

Q. Which is that?

A. The words I am reading say that Christiana stock is traded in the national over-the-counter market. The preferred shares are traded in the local over-the-counter market.

Q. The trading volume in both issues is quite limited.

A. That's right. Nothing about du Pont, though.

Q. No, no.

A. I misunderstood you. I thought you mentioned du Pont.

Q. Maybe I misspoke myself. I meant Christiana.

So that the price of 146 on the date selected, of the announcement, represented a fair comparable price for Christiana shares as against other similar shares according to the testimony, 146.

A. I have no way of responding to that.

Q. Well, you have heard——

A. That is your summary of the testimony. I am willing to accept it for this purpose.

[753]

Q. Thank you. Now, going down this sheet we see a paragraph called "Possible Advantages and Disadvantages of a Merger." It seems like quite a familiar list of advantages and disadvantages showing that the matter had been pretty thoroughly gone into by the Treasury Department. Wouldn't you say?

A. I think it is a list of advantages and disadvantages that Mr. Grimes and his associates compiled and recorded in this document. I haven't any idea how thoroughly they worked at it.

Q. You do agree, don't you, that substantially that list appears in your financial advisors' thing in one form or another because those were the advantages or disadvantages I presume.

A. I would assume that any fair-minded appraiser of the situation would have come out with the same list.

Q. Now going down to the next paragraph, Paragraph 4, we—no, it is under B.

A. I am lost, Mr. Murtaugh. What page are you on?

Q. Page 4. It is not Paragraph 4. Page 4, the last full paragraph at the bottom. "As an alternative to merger?"

A. I see it.

Q. Now Mr. Grimes or whoever prepared it, people in his department, evidently had made an investigation and

[754]

come up with at least a preliminary conclusion as to the fact that Christiana had this alternative. Isn't that correct?

A. This document refers to the possibility of a 333 liquidation as one of the alternatives that might be available to Christiana. That is correct.

Q. Now, speaking generally in the legal context, if you have a collision between two automobiles, Driver A and B, and B is clearly at fault but all he has is, say, a $10,000 insurance policy, the damages are much greater than that. Now, as a practical matter, A better settle for the 10 or maybe a slight discount from it. Isn't that good advice?

A. I have never practiced that kind of law. I wouldn't presume to know.

Q. Well, suppose you were—it doesn't sound like a sensible thing to do?

A. I will tell you about a case in Delaware just two weeks ago where it worked out differently. I don't——

Judge Ullman: Suppose we concede that if the driver at fault is totally insolvent with no hope of ever obtaining any assets it would be good advice.

Please proceed.

Mr. Murtaugh: Yes, right.

By Mr. Murtaugh:

Q. Now, if Christiana had an opportunity to effect a tax-free distribution, or a relatively inexpensive

[755]

distribution of its shares to its shareholders by a liquidation, you wouldn't expect them to give any special extra benefit to du Pont, would you? To effect the same result?

A. I would think that a prudent management would take the course of action that was least expensive to them in accomplishing their objective.

Q. Right. And so that in looking at the merger, that conditioned the amount that Christiana directors could prudently take in view of their duties to their own shareholders, is that correct?

A. No, I don't think so. I think at this stage of the game the 333 liquidation concept was a subject for investigation. Until it had been investigated I would assume it didn't condition anything.

Q. Now, on that line, now looking at the Department's Exhibit 1. Is that the correct designation?

Mr. Anderson: Division Exhibit 1.

Mr. Murtaugh: Division. Division Exhibit 1.

By Mr. Murtaugh:

Q. Which is an instruction—well, no. It is a letter to Morgan Stanley Co. dated June 6, 1972, to which is attached a memorandum dated June 6, 1972, entitled "Factors to be Considered in Report of Investment Bankers." Have you ever seen this instrument before?

[756]

A. I certainly have. I signed the letter.

Q. Okay. Yes. That is right.

Now, this immediately preceding answer is that this matter by Mr. Grimes was just thrown in the hopper for consideration or the best information he could get at the time. But this memorandum seems to be rather categorical, and it is signed by you, or sponsored by you at least in transmitting it. Is that correct?

A. No.

Q. No?

A. I don't think there is anything categorical about it at all. The memorandum is simply a document entitled "Factors to be Considered in Report of Investment Bankers," and it is signed, as I remember it, by Covington and Burling.

Q. You, however, read it before you transmitted it, I presume.

A. I would expect so. I don't remember the time sequence, but I would certainly abide by the memorandum.

Q. Now, if we can go through this document, the factors to be considered. You say—it says in passing on merger terms—on page 1—affecting common stock, the Commission has looked to such factors as comparative earnings, dividends, market value, and net asset value, including adjustments for potential taxes arising from unrealized capital gains in portfolios securities and the tax benefits

[757]

resulting from tax loss carry-forward.

It is also down below, the last sentence, in dealing with merger terms where preferred stock, the Commission has taken into account dividend and redemption terms, asset value, asset value coverage, and dividend coverage.

A. You skipped the one sentence in that paragraph that said "No single factor has been considered determinative."

Q. Okay, fine. Thank you.

Now, on this earnings and dividends paragraph on page 2, it is pointed out that there will be elimination of a discount of 7.2 percent which the inter-corporate tax wiped out of the dividends. Is that correct? Tax on dividends received?

A. It says the principal factor affecting Christiana earnings is the corporate income tax at an effective rate of approximately 7.2 percent.

Q. Then the next sentence says consideration should be given to the value to Christiana shareholders of the elimination of this tax.

What consideration was given to that in your deliberations?

A. You are moving now from this document to our negotiations?

Q. Well——

A. This is a document that was given to the investment

[758]

banking people to give them assistance in coming to their judgments.

Q. Yes.

A. We worked from the recommendations we had from the investment bankers.

Q. I see.

A. Not from this document.

Q. Now, the next paragraph deals with market values, and it points out that Christiana common stock had sold at a substantial discount from the net asset value on a market price basis of the underlying du Pont stock. This discount has recently been in excess of 20 percent. It refers to the fact that it has narrowed since the merger.

Now, the next paragraph says from du Pont's point of view, the most favorable terms of a merger would be those that approach the full amount of the discount. That means treated at $146, if du Pont was worth 164. That was determined on the date the merger was announced. Is that roughly speaking what that would mean?

A. I think that is what counsel said.

Q. Yes. All right. However, in the Delaware Realty case, the SEC accepted as a basis for merger terms values based on underlying net asset values. The rationale for this was that the parties to the merger had alternative means of recognizing net asset value without significant tax

[759]

effect.

We understand Christiana would be prepared to take the same position here. And then it goes and refers to the 30-day Section 333 liquidation.

Now, then the next paragraph says the report should indicate whether on the assumption that the 30-day liquidation provisions would operate to Christiana's benefit here, du Pont would be justified in giving little weight to the market value in the merger negotiations. Do you feel that this is flagging the investment advisors that they are controlled by the practical concept that if Christiana can accomplish achieving the market value of its quoted shares

one way, they better work within the range that is left to accomplish a merger?

A. No. Maybe I can shorten things a little bit here by reminding you that it was we who challenged the 333 calculations and led to counsel for Christiana's withdrawing that as a consideration in these negotiations.

Q. That was pretty late in the day, though, wasn't it?

A. It was before the terms were negotiated.

Q. Suppose it hadn't been withdrawn. What would have been the result?

A. It was withdrawn.

Q. It couldn't be any worse for du Pont if it hadn't been withdrawn. Could it?

A. All I am saying, Mr. Murtaugh, is that we examined

[760]

the concept, we did our homework, we found holes in the theory, counsel for Christiana withdrew the concept. And it was no longer in the negotiations.

Q. You may believe that Mr. Grimes and counsel for Christiana and so on were proceeding in good faith up to the time we will say June 30 was the time that it first was seriously challenged, isn't that right?

A. It was challenged—well, let me say it a different way.

Questions were raised by tax counsel before the parties met to negotiate. On the weekend before the first negotiating session on July 3 it was evident that the numbers would not withstand serious analysis simply because there were unresolved legal issues. When the parties met on July 3 to negotiate, the first item on the agenda was raised by me, it was what counsel for Christiana regarded as the current status of 333. He conceded that he would withdraw that as a consideration. And we went on from there.

Q. By that time the drafts of the financial houses were in hand, weren't they?

A. Yes. Yes, they had been delivered on June 30th.

Q. And they were all based on the assumption of the 333 liquidation, weren't they?

A. You are two-thirds right. First Boston paid no attention to 333, as I remember it.

[761]

Q. They got one of these memorandums too, did they?

A. Yes, sir.

Q. They didn't refer in their—well, you said they paid no attention to it.

A. I think Mr. Townsend testified to that fact here last week.

Q. Do you think that was because he didn't prepare a very thorough report or because he didn't think it was significant?

A. I think that Mr. Townsend prepared a fine report, to the credit of his firm. It was persuasive to us.

Q. He is the only one that didn't think even to flag the market impact. Is that right?

A. He didn't think enough of it to want to write about it. He discussed it with us.

Q. Now we have another value concept. I am now looking at page 37 of the first proxy. I think it was Filing No. 2—I mean I think it was filed with the proxy amendment to the second application.

Judge Ullman: Off the record.

(Discussion off the record.)

Judge Ullman: On the record. Mr. Murtaugh is referring to page 37 of Amendment No. 2 to the application.

Please proceed, Mr. Murtaugh.

[762]

By Mr. Murtaugh:

Q. This whole amendment virtually is related to a proxy statement that apparently the staff requested be prepared to go along with the application for exemption.

Under rights of Christiana stockholders objecting to the merger, the following appears: Any holder of Christiana preferred stock or common stock who objects to the proposed merger may elect to be paid the value of such stock exclusive of any element of value arising from the expectation or accomplishment of the merger providing he complies with certain requirements. Now, that is another value that is involved. I realize that in the evolution of things there has been a change in that, but it calls attention to the fact that without the merger—without the expectation or accomplishment of the merger we would have a very different set of values for the shareholders of Christiana shares. Is that correct?

A. The passage you referred to quotes the meaning of Delaware law, Section 262, involving the rights of objecting stockholders.

Q. Okay. And they are supposed to get the value, aren't they? If they dissent?

A. They are supposed to get whatever the law says they get. I take it the law means here that they get what they had prior to this transaction.

[763]

Q. Now, on page 4 of Division's Exhibit 1, that same concept is referred to in the first full paragraph.

Do you see that?

A. Yes, I see the quote, the paragraph.

Q. And the investment—we have a sort of a—I don't know if you have the interlined copy that I have here

now that has the notes of Morgan Stanley, I guess. Is that the evidence?

Mr. Gribbon: That came from the files of Morgan Stanley.

By Mr. Murtaugh:

Q. Yes. It says no weight. Have you got that?

A. I have got the same one, yes.

Q. The next paragraph I consider quite important. The distribution of du Pont stock to the shareholders of Christiana may provide an incentive for such shareholders to dispose of their holdings. While affiliates of Christiana may be restricted in the amount and method of du Pont stock, a substantial portion of such stock will be freely marketable. Christiana is also considering whether its affiliates may seek registration rights for an underwritten public offering following the merger. The possibility that these factors may have a depressant effect on the market price of du Pont common stock should be considered.

Now, tell us what was said about that in any—did

[764]

you have a discussion based on this with your two advisors?

A. The advisors got this document and in the course of their work, as they have testified, they inquired into the question of what the probabilities were that shares would move to market. Based on the information they got they arrived at the conclusions reflected in their records.

Q. The conclusion of Morgan Stanley as I recall was that the tax impact would be so great that that was enough for them to pass it over as not worth further consideration. Isn't that right?

A. I don't think that is a fair characterization of Mr. Townsend's testimony.

Q. Very well.

And the conclusion of Kidder, Peabody was that based on their asking counsel for Christiana information, that he said he knew of no sales, that they hadn't taken that into account. Isn't thai correct?

A. I don't agree with that appraisal either.

Q. Okay. In the very start of your discussion with the financial advisors did you put before them the concept of net asset value as something that was what they call a benchmark or a thing to work from rather than market value?

A. Mr. Murtaugh, I assume when you say your discussion, you mean the du Pont people, not me personally?

Q. Well, either one.

[765]

A. Because I don't think I had discussions with financial advisors except in one instance.

Q. When did you have that?

A. And that was with First Boston shortly after they were retained. They came to Wilmington one day simply to get acquainted and run through the various issues that had to be considered. But I have lost my train of thought. Now perhaps you can restate the question.

Judge Ullman: You were speaking of discussions with financial advisors. Mr. Murtaugh was inquiring about the discussions which du Pont then I suppose had.

By Mr. Murtaugh:

Q. The net asset value concept.

A. Yes.

My recollection of the events is that the financial advisors were supplied with legal memoranda by counsel on both sides summarizing all the SEC and court decisions in this area, and some of them dealt with net asset value, some dealt with other considerations.

Q. And none of them turned their back on net asset value, did they?

A. Not in an investment company situation so far as I remember it.

Q. Thank you.

Now, on this next paragraph—the last paragraph

[766]

on page 5, to the financial advisors, there is a reference to a possible premium because the Christiana block of du Pont shares was a controlling block. That concept was not highly regarded by Morgan Stanley as you recall. They didn't—

A. Yes, I think that is right. Kidder, Peabody espoused it; Morgan Stanley did not.

Q. Yes.

Now, in the General Motors case, the original antitrust Clayton Act case, you came into that case more or less from the first hearing, isn't that—

A. That is correct.

Q. Eventually, after Judge LaBuy found in favor of defendants, the Supreme Court chose to reverse that because of, oh, the relationship between du Pont and General Motors presented a picture in which there might be abuses although there was nothing in the record to prove any. Isn't that rough—

A. That is a rough and ready description of what happened.

Q. Yes.

A. I can state it more precisely. But I am not sure it makes any difference here.

Q. Yes. Well, the one thing that they seemed to fasten onto as being important was—that was concrete was that one of your departments, one of your present

[767]

departments, I think fabrics and finishes or something, General Motors might get $65 or $70 million worth of business by reason of their connection that the purchasing department of GM might have put elsewhere. Do you recall that being a sort of a concrete example without proving that du Pont did get it, but that——

A. I think that is a gross misstatement of what the court said.

Q. Well, we can look at the opinion. Do you want to restate—what was the—how much money was the prospect that General Motors could get out of this?

A. If we are going to take the time to go back for that old history—if you think it is relevant I will be glad to give you a quick summary.

Q. Listen. I will shorten it up. My sense of my questioning is there was no remote suggestion, was there, that General Motors was going to make a profit of a half billion dollars out of all the conceivable dealings it could have with General Motors over a long period of time?

A. I don't understand the question.

Mr. Murtaugh: Repeat the question, please.

(The question was read back.)

The Witness: I still don't understand it.

By Mr. Murtaugh:

Q. That du Pont was going to make a half billion

[768]

dollars. In other words, the profit element in the case was —it didn't approach the profit element in this transaction.

A. The profit element wasn't in the case. The Supreme Court, Judge LaBuy had no issue before them that dealt with profits.

Mr. Gribbon: Your Honor, I submit it is rather fruitless to pursue on cross-examination what the Supreme Court did or did not say. The opinion is there. I would suggest that Mr. Murtaugh proceed with appropriate cross-examination.

Mr. Murtaugh: Okay. I will proceed.

By Mr. Murtaugh:

Q. Now, you mentioned in some of your testimony that you and Mr. McCoy sort of speculated on a somewhat higher price than actually developed here before the ballots came in from the advisors and so on.

A. No, I don't think I said that. I thought I said we were interested in a higher price than Kidder, Peabody or Morgan Stanley had recommended.

Q. You formed some opinion before you got the report from anybody, hadn't you?

A. No.

Q. Sort of a——

A. No. This was an opinion we formed on the weekend——

[769]

on the Fourth of July weekend.

Q. Now, being only human, when you and Mr. McCoy were appointed a special committee, didn't you sometimes think either separately or together what the ratio might be?

A. Yes, indeed.

Q. Give me what your first speculation between each other was.

A. We didn't go at it that way. I did what homework I could quickly, and I discovered that the ratio of the Delaware-Christiana merger had been 1½ percent. I discovered that in the most recent merger that we knew about Mariner Eccles had merged his Eccles Investment Company into Utah Construction at a discount of 1.8 percent. That was the sum total of our information at that point in time.

Q. Do you think that from the point of view of arm's-length bargaining that prevented you from going beyond that sort of a concept?

A. As a practical matter we went beyond it. We went to 2½ percent after we got the financial advice.

Q. Well, 2½ percent is about—figured out to be about $1.15 or $1.20 per share benefit?

A. That is right. If you measure just the discount.

Q. Yes. And it turns out they have earnings benefits of about 4 cents a share, it seems to be sort of the consensus.

A. Yes, that is correct. If you limit yourself to just

[770]

that consideration.

Q. Now, just compared to—have you ever figured out—I think it is figured out in the papers here someplace, the earnings benefit to Christiana from this transaction if it goes through as proposed. And I think it comes out about 40 cents as against a nickel. Would that be fair? I mean they get increased income over what they were getting?

A. The fact that they hold their du Pont shares directly gives them an advantage that they didn't have before. There isn't any question about that.

Q. More in income?

A. More in income, that is right.

Q. Yes. Did the concept of giving them an inducement to go through by giving them an extra nickel a share of income or 4 cents a share of income as being adequate inducement in view of their lower market price and the fact that du Pont has to agree—was that concept ever canvassed at all in this picture?

A. Not that I know of.

Q. And yet either party in a two-arms'-length transaction can walk away, can't they?

A. They could in a two-arms'-length transaction. They could in this transaction. And I assume they would have if they couldn't find mutually agreeable terms.

Q. Do you think that—I asked Morgan Stanley—of

[771]

course he isn't speaking finally on the subject, but they gave it as their opinion that Christiana wouldn't stand for any greater terms. Did you hear that testimony?

A. Yes.

Q. Is that your opinion?

A. I think it was a fair estimate at the time, that given the reports of the financial advisors and given the legal considerations that were on the table, that the Christiana management would have had great difficulty in going much beyond where it wound up.

Q. And assuming that didn't take into account the benefits of the merger to both parties to any marked extent except to the extent of the 4 cents a share benefit, did you feel it would have been unethical of you to say can we have part of this benefit that we are creating by our cooperation?

A. I am not sure it is a matter of ethics. I think it is a matter of common sense. What we were looking at as business people was what benefits come to du Pont. Are there any injuries to du Pont. Once we satisfied ourselves

as to that and canvassed the views of the financial experts and the legal experts, we were satisfied with the proposition as one that was quite attractive for du Pont.

Q. Now, you haven't any—it seems to me that we have an ambiguous approach in several aspects here. One, that the shares are greatly benefited by becoming a marketable

[772]

thing as compared to the very limited market for Christiana holders; and second, they won't be marketed. Do you follow that?

A. No, I am not with you.

Q. The du Pont shares are much more marketable than the Christiana shares, I take it.

A. Yes, indeed.

Q. And they trade at a higher figure just as it stands now.

A. That is true.

Q. I have a table here that—I see information in the file, is it 95 percent of Christiana shareholders own over 1,000 shares and 200 or—132 own over 5,000 shares.

Now, with that kind of a market—the kind of a market Christiana has, those big shareholders are pretty limited in the way they could—if they wanted to get out of their whole portfolio at the present time. Are they not?

A. If you are saying they have greater marketability with du Pont shares than they have with Christiana shares, I think that is conceded on the record by everybody who has looked at it.

Q. There is no question about that. But the question is, how do they get that benefit? It is by du Pont's cooperation.

A. Of course. Of course.

Supreme Court, U. S.
FILED
NOV 18 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

VOLUME 2

IN THE

Supreme Court of the United States

October Term, 1976.
Nos. 75-1870, 75-1872.

No. 75-1870.

E. I. du PONT DE NEMOURS AND COMPANY and CHRISTIANA SECURITIES COMPANY,
Petitioners,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

No. 75-1872.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR CERTIORARI IN NO. 75-1870 FILED JUNE 25, 1976.

PETITION FOR CERTIORARI IN NO. 75-1872 FILED JUNE 26, 1976.

CERTIORARI GRANTED OCTOBER 4, 1976.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS OF APPENDIX.

Vol. 1
Page

Relevant Docket Entries (Eighth Circuit No. 75-1100) A1

Relevant Docket Entries (Eighth Circuit No. 75-1262) A4

Relevant Docket Entries (Eighth Circuit No. 75-1263) A7

Relevant Docket Entries (Securities and Exchange Commission) A10

Notice of Filing of Application, Investment Company Act Release No. 7402 (October 3, 1972) A24

Notice of and Order for Hearing on Application, Investment Company Act Release No. 7563 (December 13, 1972) .. A34

Findings and Opinion of the Securities and Exchange Commission, Investment Company Act Release No. 8016 (December 13, 1974) A38

Order Granting Application, Investment Company Act Release No. 8615 (December 13, 1974) A75

Memorandum Opinion and Order Denying Rehearing, Investment Company Act Release No. 8692 (February 27, 1975) A77

Joint Application, Dated July 19, 1972 ..... A81

Amendment No. 6 to Joint Application, Dated October 27, 1972 ..... A111

Application of Lewis C. Murtaugh for Leave to Intervene as a Party Pursuant to Rule 9(e) A118

Exhibit A:

Request for a Hearing and Advice (October 25, 1972) A129

Supplement to Filed Request (October 31, 1972) .. A155

Supplement to Filed Request (November 14, 1972) A162

Exhibit B A167

Exhibit C A171

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 1
Page

Motion by Lewis C. Murtaugh to Modify Order Fixing Pre-Hearing Procedures A172

Reply of Applicants to Motion to Modify Order Fixing Pre-Hearing Procedures A177

Rejoinder to Reply to Motion to Modify Order A180

Excerpts From Murtaugh Brief A184

Excerpts From Brief of Christiana Securities Company A194

Applicants' Joint Proposed Findings and Conclusions A198

Supplemental Petition of Lewis C. Murtaugh for Rehearing Including a Motion to Adduce Additional Evidence A204

Excerpts From Transcript of SEC Proceedings–

Colloquy A227

Charles C. Townsend, Jr.–

Direct Examination A228

Cross-Examination A285

Re-Direct Examination A306

Re-Cross-Examination A315

Edward Townsend–

Direct Examination A316

Cross-Examination A364

Re-Direct Examination A373

C. Edward Midgley–

Direct Examination A375

Cross-Examination A397

Raymond J. Harter–

Direct Examination A406

Cross-Examination A416

C. Edward Midgley (Recalled)–

Cross-Examination (Continued) A417

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 1
Page

L. E. Grimes–

Direct Examination A420

Cross-Examination A438

Re-Direct Examination A447

Irving S. Shapiro–

Direct Examination A448

Cross-Examination A480

Vol. 2
Page

Cross-Examination (Continued) A513

Edward B. du Pont–

Direct Examination A554

Cross-Examination A566

Charles B. McCoy–

Direct Examination A569

Cross-Examination A596

Re-Direct Examination A608

Colloquy A609

Applicants' Joint Exhibit No. 1A–Morgan Stanley & Co. Letter Dated July 7, 1972 ..... A617

Applicants' Joint Exhibit No. 1B, Exhibit 2, p. 6–Excerpt From Christiana Securities Company–Memorandum of Fact A633

Applicants' Joint Exhibit No. 1B, Exhibit 9–Christiana Securities Company, Net Asset Value Per Share and Discount of Market Price (Based on Mean) (1) A634

Applicants' Joint Exhibit No. 1C–Morgan Stanley & Co. Letter, Dated July 7, 1972 ..... A636

Applicants' Joint Exhibit No. 2–Letter, Dated April 20, 1972, From Irénée du Pont to Mr. McCoy Inquiring as to Interest in a Merger A638

Applicants' Joint Exhibit No. 3–Morgan Stanley & Co. Engagement Letter, Dated June 6, 1972 ..... A640

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 2
Page

Applicants' Joint Exhibit No. 4—Merger Agreement (Conformed Copy, as Executed in December, 1972) A642

Applicants' Joint Exhibit No. 5—Summary of Terms of Comparable Mergers A687

Du Pont Exhibit No. 1—First Boston Corp. Engagement Letter, Dated June 6, 1972 ..... A689

Du Pont Exhibit No. 3—Excerpts From Brief for the United States Supreme Court in the *General Motors* Relief Proceedings (October Term, 1960—No. 55) A691

Du Pont Exhibit No. 4—First Boston Corp. Opinion Letter, Dated July 6, 1972 (Exclusive of Exhibits) A696

Du Pont Exhibit No. 4—First Boston Corp. Opinion Letter, Dated July 6, 1972 (Schedule 3) A700

Du Pont Exhibit No. 4A—First Boston Corp. Letter (Final Opinion), Dated July 7, 1972 ..... A705

Du Pont Exhibit No. 5, pp. 1-20—Excerpts From Preliminary Proxy Statement A707

Du Pont Exhibit No. 5, Exhibit A—Agreement and Plan of Reorganization Between E. I. duPont de Nemours and Company and Christiana Securities Company A754

Du Pont Exhibit No. 5, Exhibit C, pp. 15-19—Excerpts From Index to Financial Statements A793

Du Pont Exhibit No. 5, Exhibit E—Excerpts From Data Concerning Directors A800

Christiana Exhibit No. 1—Kidder, Peabody & Company Engagement Letter, Dated June 6, 1972 ..... A808

Christiana Exhibit No. 2—Kidder, Peabody Report, Dated July 7, 1972 (Exclusive of Exhibits) A810

Christiana Exhibit No. 2, Exhibit 2—Kidder, Peabody Report Assumptions A838

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 2
Page

Christiana Exhibit No. 2, Exhibit 4—*Advantages and Disadvantages (Assuming Net Asset Value Exchange)* A840

Christiana Exhibit No. 3—Kidder, Peabody Opinion Letter, Dated July 17, 1972 ..... A842

Christiana Exhibit No. 4—Table Captioned "Federal Income Tax Basis to Present Holders of Christiana Securities Company Common Stock" A845

Division Exhibit No. 1—Letter From Du Pont to Morgan Stanley, Dated June 6, 1972; Covington & Burling Memorandum Captioned "Factors to Be Considered," Dated June 6, 1972; Memorandum Captioned "Effect of Compliance With Investment Company Act of 1940 on Du Pont", Dated June 13, 1972 ..... A846

Division Exhibit No. 2A—Letter From Dechert Price & Rhoads to Christiana Special Committee of the Board Captioned "Section 333 Liquidation," Dated June 20, 1972 ..... A861

Division Exhibit No. 2B—Letter From Dechert Price & Rhoads to C. Townsend, Jr. of Morgan Stanley, Dated July 8, 1972, With Attachment Captioned "Section 333 Liquidation," Dated July 5, 1972 ..... A877

Division Exhibit No. 3—Draft, Dated June 27, 1972, of Morgan Stanley Report, pp. 9, 21-22 ..... A880

Division Exhibit No. 9—Document (Undated) Captioned "List of Documents for Financial Advisor" A884

Division Exhibit No. 10—Memorandum, Dated June 22, 1972, Captioned "Some Prefatory Remarks for Meeting in New York at FDC on June 23, 1972" A886

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 2
Page

Division Exhibit No. 12—Draft Kidder, Peabody Report, Dated June 30, 1972, pp. 10-11 ..... A889

Murtaugh Exhibit No. 2—Excerpts From Testimony on Second Remand From the United States Supreme Court, *United States v. Du Pont*, 177 F. Supp. 1 (N. D. Ill. 1959), as Found in Printed Record in *United States v. Du Pont*, 366 U. S. 316 (1961), pp. 1053-57, 1506-07, 1516-17, 1558-62, 1739, 2095 ..... A891

Murtaugh Exhibit No. 4—Memorandum to C. E. Welch, Du Pont Legal Department, From Du Pont Treasurer's Department, Dated May 12, 1972 ..... A913

Murtaugh Exhibit No. 5 (Exclusive of Exhibits)—Memorandum, Dated July 10, 1972, to Du Pont Executive Committee From Du Pont Special Committee of the Board A929

Murtaugh Exhibit No. 8—Covington & Burling Memorandum Captioned "SEC Judicial Precedents Respecting the Proposed Du Pont-Christiana Merger," Dated June 6, 1972 (Exclusive of Attachment A) A949

Murtaugh Exhibit No. 9, pp. 11-17—Excerpts From Final Judgment, Dated March 1, 1962 as Amended April 26, 1962, General Motors Divestiture Case A951

Murtaugh Exhibit No. 15—Draft Agreement, Dated December 15, 1972, as to Registration Rights A958

Collins Exhibit No. 1—Letter, Dated October 4, 1972, to Du Pont Stockholders re SEC Notice A974

Collins Exhibit No. 1A—Affidavit of Mr. Harter, Manufacturers Hanover Trust Co. A976

Mr. Richard Collins' Letter to the SEC, Dated October 26, 1972 ..... A978

TABLE OF CONTENTS OF APPENDIX (Continued).

Vol. 2
Page

Order of the United States Court of Appeals for the Eighth Circuit, Dated October 9, 1975 ..... A981

Report to the United States Court of Appeals for the Eighth Circuit by Roger B. Upson on Questions Asked by the Court, Dated December 9, 1975 ..... A983

Opinions of the Court Below A1028

Judgment of the Court Below A1028

Order Allowing Certiorari (No. 75-1870) A1029

Order Allowing Certiorari (No. 75-1872) A1030

[773]

Q. Yes. And was there arm's-length bargaining on that question?

A. I think there was, and if I didn't think so I wouldn't have recommended to our board that they agree to the terms.

Q. Let's get to the concept of the control element. That seems to have an ambiguous aspect too. That A, Christiana doesn't control it, and B, that we better take care that we get the control away from them for the benefit of all concerned.

A. I think that is a loose characterization of what I have been saying at least. If you are suggesting that Christiana controlled the negotiations and was on both sides of the table, I think there is no basis in fact for that suggestion.

Q. I am suggesting that either we have a bad situation as it stands now or a potentially bad situation.

A. I said on Friday that I thought there was a great value to the du Pont Company in having a dispersal of the 28 percent block of shares in Christiana's hands given the future that I foresaw.

Q. I think you said if you let your imagination run you could foresee some possibilities that might be injurious in the future, isn't that true?

A. I saw great success in the past and less prospect

[774]

for that kind of a record in the future simply because we couldn't foresee people of the quality of Pierre du Pont, Irénée du Pont coming along in the management of the du Pont Company and playing a role. And our concern was simply that we would wind up with a situation in which a block of 28 percent of our stock was in the hands

of people who had no experience with the chemical industry, no background in the du Pont Company, and who might have ventures of their own that would interfere with the best interests of the du Pont Company. And it was in that context that I said if you let your imagination run you can conceive of a number of ways of getting into difficulty. And I suggest that a prudent management ought to take cognizance of that kind of a risk no matter how remote it might be and do what it can to avoid it.

Q. Do you think that the dispersal—that is your word, isn't it?

A. Yes.

Q. Of 13½ million shares of du Pont will effectively eliminate the du Pont family from substantial sharing in control of du Pont?

A. I don't think I said anything like that.

Q. I didn't say you did. I said do you think——

A. Oh, excuse me. I misunderstood your question. What I am saying is that if there is a dispersal

[775]

of that block of shares, in large part the shares would be distributed to members of the du Pont family who expect to hold the shares. To that extent they will continue to have a relationship with the du Pont Company and will be valued stockholders and hopefully some will want to come into the business from time to time. Nevertheless, instead of having one block of 28 percent of the shares which can be used as a block if it is so desired, each of the individual members of the du Pont family will have their own holdings and that will be it.

Q. You joined the board in 1970, that is correct?

A. That is correct.

Q. Just for the record, when was Mr. McCoy—when was he elected president, or chairman?

A. I would guess about—chairman, did you say?

Q. No, chairman was just last year, wasn't it?

A. Yes. President I would guess about 1967 or thereabouts.

Q. I see.

Now, the effect of this transaction if it carried through will be to make management more in control of its own house than it is. Let's assume it is——

A. I don't think so. I think management is in control of its own house now. What I have been talking about are future problems that could arise given a block of stock of

[776]

this size. In my view, Mr. McCoy is running the du Pont Company as the president with free discretion today.

Q. And he has the cooperation of Christiana Securities Company in that regard, does he?

A. I wouldn't put it that way. I think he has the cooperation of numerous members of the du Pont family who serve on various committees in the du Pont organization, such as our finance committee, and people who also happen to have Christiana stock.

Q. And they have that Christiana stock in much greater numbers than their du Pont stock in general, don't they?

A. Some of them do. But they still regard themselves as holding du Pont stock.

Q. Now, you are a lawyer. Can you see the difference between holding du Pont stock and Christiana stock?

A. I see the formal difference, certainly.

Q. Would you say it is fair to say that they are essentially the same, du Pont and Christiana stock?

A. Well, you are toying with me, Mr. Murtaugh. The underlying assets are comparable.

Q. And these underlying assets are owned by the corporation, aren't they?

A. That is correct.

Judge Ullman: Do you have much more, Mr. Murtaugh?

Mr. Murtaugh: What's that?

[777]

Judge Ullman: Do you have much more.

Mr. Murtaugh: I really do believe I do, Your Honor. I haven't started hardly. But I will attempt to expedite it.

By Mr. Murtaugh:

Q. Calling your attention to the General Motors divestiture case, you gave—while I don't agree with some of your characterizations, I am satisfied that you have defined what the issue raised by—I mean the proposal was based on the first remand accurately. You said you were present during that whole trial, is that correct?

A. Yes, I was.

Q. Now, calling your attention to page 1559 in Murtaugh Exhibit No. 2.

A. Can you tell me more than that so I can find it?

Q. Yes. It is the transcript hearing, page 1559 of the transcript. Maybe you don't have it.

A. I have it. I am with you.

Q. I really mean 1558, the matter starts on 58.

You see there that Mr.--you knew Mr. Emerson, I presume.

A. Yes, I did.

Q. He was a responsible principal in Morgan Stanley and Company, is that right?

A. That is correct.

[778]

Q. And he was a witness for du Pont in this matter, wasn't he?

A. That is correct.

Q. And he was asked to make a different assumption than the Government's proposal which you defined. I would like to make a different assumption now. I would like you to make the assumption——

Judge Ullman: Are you reading, sir?

Mr. Murtaugh: The last question on the page. I would like you to make the assumption that legislation is passed which would permit a tax-free distribution of General Motors by du Pont which would then require the recipient to spread or apportion his tax base over the cost of the shares of du Pont he retains and shares of General Motors he receives. I would like you to assume that under such legislation there is a single tax-free distribution by du Pont of a whole block of 63 million shares. Secondly I would like to have you assume that there is a court order entered at the request of the Government requiring Christiana-Delaware and stockholders of Delaware to hand their stock over to a trustee and requiring the trustee to make ten annual equal payments of the stock and that there will take place other sales of General Motors stock in that period for whatever reason that you think such sales would take place. I would like first to ask you if under such an order

[779]

you think there would be sales of the stock received by du Pont's stockholders other than Christiana-Delaware and the stockholders of Delaware. Answer,

yes, there would be. From what source do you get this opinion? Well, 43 million approximate shares of General Motors will be divided among the du Pont stockholders proportionately at one time. The stockholders of du Pont bought du Pont because they like du Pont and some of them—I feel they had all the General Motors they wanted. Some of them might not like General Motors. For a variety of reasons even though there is no tax impact there would be some selling of General Motors in addition to any impact. Question, I don't want to be mysterious. You understand my hypothetical question is directed to legislation such as the Frear bill which has been introduced in Congress.

Judge Ullman: End quote?

Mr. Murtaugh: That is a quote, yes.

Judge Ullman: You have ended the quote, have you?

Mr. Murtaugh: Yes, I have ended the quote.

By Mr. Murtaugh:

Q. Now, Mr. Emerson is answering a question as to the effect on the market value of General Motors of carrying out a decree where there would be this forced sale of 2 million shares a year for 10 years, but there would be tax-free distribution both to Christiana and to the du Pont

[780]

shareholders. You grasp that.

A. Yes.

Q. And he says now did you form an opinion of the effect on the market value of carrying out such a decree

under legislation? Yes. Initially it would be in the area of 15 percent.

Do you remember that, or you read it and see it?

A. I see it in the transcript. I certainly don't quarrel with the transcript.

Q. Yes, right.

Now——

Mr. Gribbon: Your Honor. I don't see any purpose in reading this into the transcript again. It is already in evidence.

Mr. Murtaugh: I am asking questions.

Mr. Gribbon: Well, you can ask the question without reading it again.

Mr. Murtaugh: Yes, sure.

By Mr. Murtaugh:

Q. So that there was evidence presented in the General Motors case on the effect of the tax-free transaction. Is that correct?

A. There was a question asked that involved an assumption of a tax-free transaction, that is right.

Q. Now, that question was asked again at 2095 in the

[781]

transcript of Mr. Lenz, one of the principals of Merrill Lynch.

You see roughly the same type of answer.

A. That is right. On a premise that 63 million shares would move out on a one-shot basis.

Q. But that Christiana would have to sell over a ten-year period?

A. That is right.

Q. Now, do you recall that in the preceding year to this hearing, probably '57 or '58, the volume of General

Motors shares on the New York Stock Exchange was roughly about 8 million shares?

A. No, I don't, sir.

Q. You don't. You do know, do you, that General Motors shares was traded at other exchanges besides the New York Stock Exchange?

A. I would assume so, certainly.

Q. And maybe some over-the-counter trading too.

A. I don't know.

Q. The relation of—if the 2 million shares of General Motors which was to be sold each year constituted about two and a half months of volume of total sales of General Motors, do you think that would have an adverse effect on the market if adroitly handled?

A. You are talking now about the General Motors

[782]

situation?

Q. Yes.

A. The testimony at the trial, if I can summarize it quickly—the testimony we presented in substance said that given an overhang on the market for ten years, forced sales, forced distributions, there would be a continuing impact on the market. The Government testimony was to the contrary.

Q. Now, you testified last Friday that as far as you knew there just weren't going to be any of these du Pont people selling unless estate requirements came in to intervene or some such thing. Isn't that the substance of your testimony?

A. I think that is right. That we knew of no facts, and we had checked, to suggest that the du Pont family wanted to liquidate its holdings in the du Pont Company.

Q. Well, if they wanted to diversify even 25 percent, would you think that was a foolish way to handle their affairs? Or a disloyal way?

A. I certainly do, but they wouldn't ask me.

Q. Do you think there would be some disloyalty in that?

A. Well, you say that in jest, but let me say to you that the members of the du Pont family have a deep emotional attachment to the du Pont Company that traces back more than 170 years. So that when they look at du Pont

[783]

and du Pont stock, they look at more than dollars and cents.

Q. Well, now, some of them are liable to run across advisors that advise them to diversify, aren't they?

A. Some are even liable to make mistakes and get into financial trouble.

Q. Now, the next—if it were a fact that as many as a million shares of du Pont were brought on the market in the next six months, would you feel that you had been mistaken in your estimate of the market activity? I mean after the merger?

A. I would be surprised, because I would expect that if there were intentions to bring a million shares to market, those intentions would be disclosed and would be in the proxy material.

Q. Suppose that you believed that that type of selling would occur. Would you just call off the merger?

A. But I don't believe it.

Q. I am just asking you.

A. I can't really put myself in the frame of mind to consider alternatives on something that doesn't appeal to me as a realistic fact.

Judge Ullman: We will be at recess for ten minutes.

(Whereupon, from 11:20 to 11:30 a.m., a recess was taken.)

[784]

Judge Ullman: On the record.

Please proceed, Mr. Murtaugh.

By Mr. Murtaugh:

Q. You mentioned the word "overhang" in connection with a description of the General Motors divestiture. The overhang is a depressant—the knowledge that stock is coming on the market is more or less a depressant if it is concrete enough. Is that your——

A. The knowledge that stock must come on the market, which was the General Motors divestiture situation—you had a court order commanding that it happen. Everybody in the financial community knew that it was going to happen, and it was going to happen for ten years.

Q. Now, according to your best information there is not going to be any marked increase in du Pont's shares by reason of this merger. Is that correct?

A. You are talking about shares coming to market?

Q. Yes.

A. So far as I know there are not.

Q. In other words, we are going to have a situation where we have many more shares available for market but they just aren't going to come on the market? Is that correct?

A. That will depend on the individual choices of each of the stockholders. What I am saying is that as of this

[785]

point in time that we know of no facts that the du Pont family wants to liquidate any of its holding in the du Pont Company, and therefore we have no—we see no prospect of major shifts of du Pont stock to the sell side of the market.

Q. You wouldn't—all stock is potentially sellable. It is in the name of—all du Pont shares, I presume, aren't they?

A. I would assume so.

Q. We dealt a lot in potentials here in listening to the application. This is another potential, isn't it?

A. On that basis, Mr. Murtaugh, there are 287 million General Motors shares potentially sellable. I don't think it takes us any place. The question is how many shares are actually going to come to market.

Q. There is no real brake on them coming to market. They have to be considered by the people who analyze the shares, don't they?

A. The only brake there is is the self-interest of the investor. He is not acting under compulsion, and he acts to protect his own self-interest.

Q. And there are more potential sellers than there are buyers in this context now, aren't there?

A. I don't know that at all.

Q. At the present price, do you think the present price balances the supply and demand situation of shares

[786]

of du Pont?

A. In recent months the price of du Pont has been moving up. I would assume that signifies that there are more buyers than sellers.

Q. But they are finding a level of price——

A. Everyday is at a different level, that's right.

Q. And the fact that the du Pont people for the time being forbear to issue substantial quantities of du Pont stock is no reason why analysts shouldn't take that into account as an overhang at least for average increased selling?

A. You are playing on a word. By my definition of overhang, which I think is the definition of the financial community, shares in the hands of owners of the stock with no compulsion to come to market is not an overhang.

Q. No matter how much they are increased?

A. I think that's right. Otherwise I think companies would never split their stock.

Q. Suppose that 72 percent of du Pont shares were owned by Christiana and the other 28 percent were on the market. Would you have a different point of view?

A. I would certainly want some financial guidance with that kind of a picture.

Q. Even though the people avow they are going to continue their continuity of interest?

A. All I am saying is that that is so different a

[787]

picture than the one I know that I would go to the experts and get their best advice.

Q. Do you know of a single case in which fourteen —13,500,000 shares constituting 28 percent and having a value of over $2¼ million—do you have any precedent that shows any market effect or lack of market effect just looking at the marketable shares?

A. I haven't studied that question at all. The question we have asked the financial advisors that they advised us on is whether there is any material injury to the market value of du Pont that is likely to come from this

exchange proposal, and the advice we got was that there is not.

Q. The usual way they say that the addition of a substantial number of shares is digestible either by secondary offering or other means is that there will be no permanent or lasting effect. That is a phrase that you have heard often, haven't you?

A. Yes, indeed.

Q. But if a substantial seller of du Pont shares from the Christiana block starts selling, would that start a feeling that maybe the situation for diversification has arrived?

A. All I can do is guess, and I don't think it is fruitful for me to guess at this proceeding. I don't have any foresight of that kind.

[788]

Q. Do you think that the addition of shares to—sellable shares to the market does not constitute any sort of an overhang at all?

A. Perhaps we can cut through all the jargon. I think the point of difference between you and me, Mr. Murtaugh, is that you assume if shares go to stockholders, that means they come to market. And everything that I know about financial matters and everything the experts testified to last week said that they have an effect on market when you have a stockholder who is prepared to sell the shares, not when he has got shares tucked away in a safe deposit box. We have been around and around and around on this one point.

Q. Was it considered in this transaction to have agreements not to sell by some of the people holding very large blocks?

A. I don't remember hearing of any agreements not to sell. I remember hearing of Mr. Gemmill's representa-

tions that his clients had no present intentions of taking the shares to market.

Q. Suppose that intention developed next year; would Mr. Gemmill's remark include next year if they change their mind? Or do you think this is just the present intention?

Judge Ullman: I am going to sustain an objection on my own to that question because we have been through this

[789]

so many times that I think it is rather fruitless and pointless to continue the same type of argument which is ensuing at this time.

Mr. Murtaugh: Very well.

I would like to have marked as Murtaugh's Exhibit 7 for identification the complaint in the case of Christiana Securities Company, a Delaware Corporation, Versus United States of America, Civil Action 5831, in the United States District Court for the District of Delaware.

Judge Ullman: This is a complaint which Mr. Murtaugh has described. It has 28 pages plus exhibits. Is there any objection to this being received in evidence? Is that your intent, Mr. Murtaugh, to put it into evidence?

Mr. Murtaugh: Yes, it is, Your Honor.

Judge Ullman: Is there any objection to its being received? There being no objection, the document is received as Murtaugh Exhibit 7 in evidence.

(Murtaugh Exhibit No. 7 was marked for identification and received into evidence.)

By Mr. Murtaugh:

Q. You have read the material, I presume, that I have sent into the Securities and Exchange Commission, request for hearing.

A. I did at the time you sent it in, yes.

[790]

Q. And parts of Murtaugh Exhibit 7 were contained in that material that I sent in. And you read that.

A. I did.

Q. And you were aware of the fact that Morgan Stanley and Merrill Lynch gave supporting opinions and Christiana took the medium and claimed a substantial discount because of the distribution of the General Motors shares to Christiana. Is that correct?

A. I testified to it on Friday, and if you left out the word "substantial" I would agree with your description of what I said. I don't remember the exact number that was used, but it was a discount from the market price.

Q. That was not based on the theory that Christiana had to sell—that valuation was not based on any——

A. Yes, it was. It was based—as I understand the law that was used in making that judgment, it was based on the premise that on the date of receipt of the shares by Christiana it was a willing seller, someone else was a willing buyer, and he would buy the shares for cash.

Q. As a matter of fact, you knew in that case Christiana distributed about 90 percent of the shares it got.

A. That's correct. The court decree required that.

Q. Yes. To its own Christiana shareholders.

A. That's correct.

Q. So this question to which Merrill Lynch and Morgan

[791]

Stanley responded was not—was really to question the value on the date of distribution of the shares of General Motors to Christiana. Not that they had to sell them, but the value of them.

A. That's correct.

Q. Now, when a person inherits stock they face a similar problem, don't they, even though they don't intend to sell?

A. I assume so.

Q. Isn't the essential reason that a discount is given not the temporary one-day effect of putting large blocks of stock on the market, but the fact that in truth you can't realize that amount in any reasonable period of time if you seek to market it?

A. There is not much point in you and I debating this. As I understand the situation, the two investment banking houses were given instructions as to what the law required. They were told to assume there was a willing seller and a willing buyer on a given date and the transaction was going to be in cash and to determine at what price the shares would move. Now——

Q. You don't think that concept has anything to do in a merger?

A. I do not.

Q. In other words, to repeat myself just once more on

[792]

this question that I started with, you believe that you are entitled to assume that there is a value—a real value by a quoted market on a particular day of a very limited number of shares which can govern a $13-billion transfer —13-million-share transfer of shares?

A. I don't think I ever said that.

Q. Well, do you deny it, then?

A. Everything I have said is to the contrary. I have talked about a merger in which du Pont shares come to du Pont plus certain unrelated assets, and du Pont share certificates go back to Christiana stockholders simply less 188,500 shares.

Q. Now, you used a rather colorful word here, fungible. You said this is an exchange of fungible shares.

A. In my view each du Pont share is fungible with another du Pont share.

Q. Even though some of it is owned by Christiana and others owned by individuals?

A. I will state it my way. We have 47-million-plus shares outstanding. Each of those shares is interchangeable with the other. They have the same values in the market place. They have the same values as stockholders by any test you want to measure it.

Q. Well, if a person that owned 13 million shares died and another fellow that owned a hundred shares died they wouldn't have the same value, would they?

[793]

A. Not for estate tax valuation purposes, that's correct. Because the estate tax law says you do the valuation a certain way.

Q. It just says fair market value, doesn't it?

A. I don't see where we are going. I am saying that in my view a merger transaction is totally different from an estate tax valuation problem or the problem that Christiana had on the receipt of its General Motors shares. If you feel differently, so be it.

Q. Now, this figure of $1.20 you refer to as sort of a throwaway to give people something to say that you did something for them. Is that——

A. What I mean to say——

Mr. Gribbon: Where is it referred to in the record as as throwaway?

Mr. Murtaugh: Let's see. 714. He said since people–here I am reading——

Judge Ullman: Referring to a page in the transcript of these proceedings? What page?

Mr. Murtaugh: 714.

Judge Ullman: Quote?

Mr. Murtaugh: Yes. Quote. "But since people–and here I really am thinking of many of our employees who have no grasp of management in this sense, no grasp of the importance of getting these blocks dispersed–these people

[794]

would not understand clearly why this kind of a transaction was being entered into, and so I gather this is customary in these transactions, and we did it here. We negotiated an inducement factor to demonstrate to people that there is a dollar value in addition to this other value I have been taking about."

Now, that means that the people with no discernment will be moved by this thing to say 55 million or forget it?

The Witness: I don't want to limit it to people with no discernment. I would hope all the stockholders would read the proxy material and they would recognize that an improvement of 55 million is a significant number and they would recognize also that the dispersal of the block of shares is an important matter for the future of the du Pont Company.

By Mr. Murtaugh:

Q. And even though a half billion is transferred in additional wealth to the controller or to an important block of shareholders——

A. Let's not argue about it. You have your view of the transaction, I see it differently. There is not much point in our repeating the same thing again.

Q. Very well.

Judge Ullman: You have finished your cross-examination?

[795]

Mr. Murtaugh: Yes.

Judge Ullman: Mr. Maher, do you have any Questions?

Mr. Maher: Yes, sir, I have a couple of questions I would like to ask if I may.

Judge Ullman: Yes.

By Mr. Maher:

Q. I am trying mostly to find out the meaning of some of these things.

You mentioned earlier in your testimony at Friday the du Pont family was not interested in getting out of the du Pont Company, and the question that I have is if so, why are they willing to give up their potential control by selling Christiana–merging Christiana out?

A. I have asked myself the same question, and the analysis that I made in my own mind is one that I tried to recite on Friday. But let me see if I can quickly restate it again.

As I see the situation, the modern du Pont Company starts with Pierre S. du Pont and runs through the various

men who were president of the company that I mentioned on Friday. There were other du Ponts, such as the father of one of the witnesses to follow who are in the management, made a contribution to the company. They built the company. We are now at a point in time in which those who are left are men in advancing years and in my view are trying to make

[796]

plans for the future. I think they are looking at what is apt to be the situation after they are gone. And the fact that they have concluded that this is an appropriate time to merge Christiana I think confirms that kind of an analysis, particularly when you consider that ten years ago they were quite unwilling to do it when it would have meant substantial dollars to them to do it.

Q. You don't think that potential changes in the tax laws have any influence on this, do you? The possibility that this capital gains tax may be withheld later, or the attempt to get the best possible tax analysis of it before this law is changed? This wouldn't influence it?

A. I would expect that they are prudent businessmen, and if they intend to do it at this point in time they would rather do it as a tax-free merger than do it as a taxable transaction. But it seems to me the critical factor is an intention to do this. I think the evidence strongly suggests that avoidance of taxes in itself has not appealed to them as a business reason for their course of conduct.

Q. And you don't think there is an advantage to them in merging at this time that is worth a little more to the company than just this dispersal, dispersing of a potential control at a future time?

I am trying to get your definition of control. You were asked yesterday, or defined control. You mentioned

[797]

potential control and I am trying to get a definition of potential. How positive is this or is this just another speculation? Do you have facts to set this out?

A. What do you mean, Mr. Maher, when you say "this"? That is where I got lost.

Q. Potential—your wording is the big advantage to du Pont is not monetary. The big advantage to du Pont according to you is the dispersal of stock and the reason you make this—or say this is a big advantage is that it will eliminate potential control.

A. Let me tell you what I am thinking of. Maybe this will respond to what you are driving at.

If you look to the future and assume that the key men who are in the management of Christiana at this point in time are gone and their estates have moved on to their children and their grandchildren, you have to ask yourself who will be the management of Christiana, what qualities will they bring to the task. On the one hand, you might conclude that there may be new Pierre S. du Ponts which would come on to the scene, which would be a welcome proposition. On the other hand, one could foresee that there will be fine young people with zero interest in the chemical business, the chemical industry. There may be some who have no financial acumen. There may be some who get into financial difficulty. There may be some who are temped to turn a fast buck and sell their

[798]

shares to someone who wants to get control of du Pont. Let me say it the other way—who wants to get——

Q. I like that way better.

A. I know you do, but I misspoke myself.

Q. They can't sell if they stay in Christiana.

A. Someone who wants to get control of Christiana by getting a significant block of Christiana shares. And you can go on that way. Now, my problem is you ought not to really make business decisions on possibilities rather than probabilities.

Q. Right.

A. But as I sit here today, the picture that I face is one that says the future is uncertain, there is an opportunity to get this block dispersed now. Given certainty versus uncertainty, it is prudent to take the certainty. It may turn out that if—

Q. Yes. At merely no loss to du Pont; no possibility of a little gain in the thing?

A. I think the central consideration opposite our stockholders is that there not be any injury to their interests by this kind of a merger. Now, once you get beyond that you ask yourself where do you stand. Here are two bodies of stockholders in the du Pont Company. Is there any sense in saying that one is entitled to benefit simply because the others are going to get their du Pont stock directly?

[799]

Q. Well, not only getting du Pont stock directly, but they are also getting a very substantial tax saving or tax avoidance or whatever you want to call it, which you said yourself a moment ago really wasn't important. But I think this is probably—myself, I feel this is one of their controlling thoughts in the matter. That is the Christiana's thoughts. They are giving up a control, they are giving it up for a half-a-billion-dollars windfall or advantage or whatever you want to call it. The rest of us du Pont stockholders are giving this to them with nothing gained to us except that nothing happens.

A. I don't think that that is a—

Q. It is not good business to me.

A. I don't think that is a fair characterization. The rest of the du Pont stockholders are getting 188,500 shares of du Pont back plus all these other assets.

Q. Out of 46 million that is—

A. Excuse me. What the Christiana stockholders are getting is the net effect of the transaction that the law gives them. Nothing is coming from the du Pont stockholders that affects their vital interests.

Judge Ullman: Gentlemen, we have had so much argument in this case at a stage that should be producing evidence that I think we may reach a very unique situation here where there will be nothing left for the lawyers to say

[800]

in their post-hearing documents.

Please proceed, Mr. Murtaugh. Excuse me, Mr. Maher.

Mr. Maher: I am not the lawyer.

By Mr. Maher:

Q. One more question. You referred the other day to—I don't know exactly what the situation was regarding. It had to do with the Dow Chemical Company had a stock split. Now this was tossed in, and I didn't see at the time—I don't have the transcript in front of me. I didn't see at the time what it had to do with this particular case, and I still don't.

A. Well, let me make myself clear. I probably didn't express it very well.

I simply commented on Friday that in reading the Wall Street Journal that morning I had noted that Dow was having a stock split and that in another instance Alcoa

shares were coming to the market from the Mellon family. And I was addressing myself to Mr. Murtaugh's point that if the shares are outstanding, that is a threat to the market, to the price of the shares, and I was suggesting my inference at least that if that was a valid point, then the management of Dow must be negligent in splitting its stock.

Q. Well, I don't quite see it that way, because as I see a stock split, you don't increase the overall equity in the company. You just get two shares for one, but you have

[801]

half the value for each share.

A. I think that is true.

Q. I don't think that is true in this case. They are getting full shares free to move which they could not move at this point.

A. They could not move the shares while they are in Christiana's hands, that's right. Christiana could move them.

Q. I was just trying to figure out your simile. It didn't make too much sense to me. No more questions. I think I have got it clear.

Judge Ullman: Does the Division have cross-examination?

Mr. Osheroff: Yes, Your Honor.

By Mr. Osheroff:

Q. Mr. Shapiro, to maybe finally clarify the record on this point, is it your testimony that you know of no intent on the part of any particular member of the du Pont family to sell their shares in du Pont if the merger is effectuated?

A. That's correct. And I would go beyond that. I know that inquiry has been made of the heads of each of

the branches of the family represented in Christiana, and they have assured counsel for Christiana that there is no plan to sell.

[802]

Q. The finance committee of the du Pont corporation has been discussed briefly on the record. And I understood you to say that a number of members of the du Pont family are on the finance committee.

A. Yes.

Q. Firstly, what is the function of the finance committee?

A. The finance committee reviews the capital appriation requests in excess of $2½ million and either votes them up or down as the case may be. As a matter of procedure, the industrial department presents a proposal to the executive committee, the executive committee approves it, and if it involves an allocation of more than $2½ million it goes to the finance committee for its review. And if the two authorize it, then the appropriation is made. Now, it has related duties in connection with the declaration of dividends recommendations and matters of that sort.

Q. They have a final voice in capital outlays, or is it sort of a veto power? How would you describe it?

A. It is a veto power in the sense that the executive committee approves and the finance committee has the power to disapprove if it chooses to.

Q. How many members of the finance committee are there?

A. I would guess about seven. But I am not absolutely certain.

[803]

Q. How many members of the du Pont family are on the finance committee?

A. A majority. I can tick them off if you want to take the time for it?

Q. For the record.

A. Well, the chairman is Mr. Greenewalt. George Edmunds is a member of the du Pont family. He is on the committee. A. F. du Pont is on the committee. Sam Carpenter is on the committee. In addition to these people you have Mr. McCoy, Dr. Kane, Dr. George Holbrook. I think that may be all of them.

Q. How are the members of the finance committee appointed? And what is the tenure? How can they be removed?

A. They are members of the board of directors. The board designates a finance committee from among its members just as it designates an executive committee. It is a one-year term in that sense. Each year as the board is organized the various positions are designated.

But in practical effect, it is a continuing assignment.

Q. Did the finance committee have any—or does it have any voice in the terms of the merger?

A. It did not. It normally would in any other kind of a transaction. But in this case there was not a quorum of the finance committee that was not involved in the merger on the other side, and so the matter went from the executive

[804]

committee to the board.

Q. Are you saying that in view of the involvement of the members of the finance committee there was an insufficient quorum for them to consider it?

A. That's correct.

Q. Otherwise they would have considered it?

A. In a normal—"normal" is not the word I want. In the ordinary merger transaction involving a substantial

sum of money the proposition would come to the executive committee; it would recommend to the board that affirmative action be taken. The finance committee would review it and enter recommendation. And the board would finally act.

Q. Getting to the early stages of the consideration of the merger, I understand the initial meeting of the du Pont Corporation people with respect to the merger was April 28th.

A. No. April 26th, I think. It was a Wednesday. Our executive committee met on a Wednesday, and I think the Christiana board met on the 28th, a Friday.

Q. Were there two meetings on the 26th and the 28th.

A. We had a meeting on the 26th, as I remember it, and then—that was the Wednesday. And on the Friday morning all the counsel and the financial people in-house met, and that afternoon the Christiana board acted, and as I remember it it was announced after the market closed on that Friday afternoon.

[805]

Q. What was the earliest date at which the du Pont people—I mean the corporate people started considering whether or not Christiana had any alternatives to the merger?

A. I would assume it would have to be after the 26th of April. That is when the executive committee agreed to go forward and designated a negotiating committee. And as I remember it that is when I got a staff organized to go to work. It was that week, at least. By the Friday of that week Mr. Grimes and Mr. Welch were at work on this subject and were attending the meeting with counsel.

Q. Yes. As I recall Mr. Grimes' testimony, he indicated that the possible Section 333 alternative was discussed at the April 28th meeting, or so he thought.

A. I think so. At that meeting there was a run-down of everything anybody could think about as an item for consideration and assignment of jobs to be done.

Q. At that April 28th meeting, assuming that is the correct date, do you recall what, if anything, was said about the Section 333 alternative?

A. I think that there were statements by counsel for Christiana that Christiana had an alternative to liquidate under Section 333. I don't remember at this point in time whether they had number calculations at that time or not.

Q. Did you have a view at that time, were you skeptical at that time of the Section 333?

[806]

A. I simply didn't know enough about it to have any view. I had heard the designation, but I didn't know enough about a 333 liquidation to be able to talk about it intelligently at that point in time.

Q. Prior to getting any of the recommendations of the three financial advisors, did you or Mr. McCoy to your knowledge or other people at du Pont have a fairly firm view as to what you felt the terms of the merger should be?

A. No, I don't think so. I had some tentative ideas that imposed a floor on the thing, but that was all. I am not sure that Mr. McCoy had even gone that far at that time. We were waiting for the financial reports.

Q. Now, you said I believe in your testimony Friday that what you did essentially was to first of all bring to it—I take it that means the merger—a businessman's viewpoint of the transaction "and then seek to get the best financial advice we could get and the best legal advice we could get to test what our own thinking was." Then you said in terms of being able to get the tax ruling and to get the appropriate exemption order, et cetera. Does that

mean you had some conception of what generally the terms should be or does that mean something else?

A. I don't mean to say—if the record sounds that way—that we first sat down and said let's first figure out what we would do as businessmen; then we will get some

[807]

financial advice and see how that checks with the decision we made before. I think what I was saying, or intended to say, was that we approached it when we got down to the final consideration on the 4th of July weekend in terms of what makes sense from a businessman's standpoint, what makes sense from the advice we are getting from the financial advisors, and what makes sense in terms of getting an appropriate SEC exemption order.

Q. You also testified that you and Mr. McCoy had agreed among yourselves on the terms that you wanted to bargain for.

Mr. Gribbon: Could you give me that transcript reference, please?

Mr. Osheroff: Yes. That is on page 716, at about line 10.

Mr. Gribbon: Thank you.

By Mr. Osheroff:

Q. If the advisors had suggested or recommended a substantially greater discount than actually was the case, would your negotiating committee have recommended merger on those terms?

A. You are asking me to assume that the advisors came in and said instead of the numbers they had they had substantially different numbers?

[808]

Q. Let's say a 5 to 10 percent discount.

A. All right. And what assumption should I make about the advice on what is the proper construction of the statute?

Q. Are you referring to the Investment Company Act?

A. Yes. Yes. I got financial and legal advice. And I think the practical answer would be that we would have been guided substantially by the financial and legal advice we got as to what the statute means and what is appropriate under the circumstances.

Q. Now, you did have familiarity with the draft reports of the investment advisors.

A. Two of them. The third, the Kidder, Peabody report, I heard an oral presentation. I don't think I have read the report.

Q. Okay. Let me refer particularly to Division Exhibit 3, the Morgan Stanley draft report. You were familiar with that?

A. I did see that on June 30th.

Q. And there was a meeting on June 30th, is that correct?

A. There was a meeting on June 30th in which each of the financial advisors presented an oral summary of their views.

Q. Now, did the negotiators and counsel, etc., discuss the draft reports, particularly the Morgan Stanley draft report, at that June 30th meeting?

A. I don't think there was a discussion at all. This

[809]

was simply a matter of hearing the reports of the three financial houses. The only discussion I recall was with Kidder, Peabody. Their oral presentation recommended an exchange without any discount. And one of us asked from the table why they had not submitted a range as the request had said, and in response to that they said, well, they thought the transaction ought to be on a no discount basis, but if a range was desired their numbers were a premium of 1.7 to a discount of 1.7.

Q. Now, Morgan Stanley was the advisor to both Christiana and du Pont.

A. That is right.

Q. Its draft report speaks in terms of a discount of .5 percent to 2 percent.

A. That is correct.

Q. Did you think that that was a reasonable approach?

A. I had no reason to disagree with it. I think it made sense to us. We thought that we would like to see the ceiling a little higher than that, but we had no problem with their basic approach.

Q. Well, their approach, as I read the document, relied almost exclusively on the then supposed existence of a Section 333 liquidation which would cause an incurring by Christiana of a maximum 2.84 percent tax impact. Is that your understanding?

[810]

A. They made a point that said that was the maximum exposure that Christiana could tolerate, that is right, based on the 333 concept.

Q. Well, isn't it true not only did they make a point of that, but isn't it true that in their draft report that their views for setting their ranges in the merger relied almost exclusively on what they supposed the 333 impact would be?

Mr. Gribbon: Your Honor, I submit that exhibit will speak for itself. It is a 22-page document that is in evidence.

Judge Ullman: Do you want to press the question Mr. Osheroff, or——

Mr. Osheroff: No, I will just make that assumption for the time being, Your Honor.

Judge Ullman: I am not sure I understand whether you are waiting for an answer from the witness or whether you want me to rule on the objection.

Mr. Osheroff: No, let me rephrase it.

By Mr. Osheroff:

Q. What did you understand the basis of Morgan Stanley's draft opinion to be?

A. I understood the basis of their opinion to be that this was a merger with an investment company; that the traditional approach was one of measuring the fair asset

[811]

value of the assets; that in cases of this kind there had been mergers with no discounts or premiums, there had been cases in which premiums had been granted, and there had been some cases in which discounts had obtained. The highest discount known was the 1½ percent in the Christiana-Delaware merger. And I am not clear in my recollection now whether they adverted to the Utah Construction merger or not, but that was one that was not brought to the SEC, as I remember.

Q. Now, at page 20 of Morgan Stanley's draft report, as I read it in the last paragraph, isn't it finally what Morgan Stanley says that what they supposed would be the impact of a 333 liquidation, that is, 2.84 percent—that it is that discount which is significant in considering merger terms?

A. There is a sentence at the bottom of the page that says that. I concede that. But I suppose their views are really summarized on page 21 and following under the conclusion.

What I had in mind particularly, Mr. Osheroff, is the material at the bottom of page 21.

Q. Right. In which it says that "Values in the range of adjusted net asset value (no discount) to a discount in the area of 2.84 percent would appear to represent the widest range within which negotiations should be conducted."

[812]

But I assume you agree that the 2.84 figure is apparently based on the then supposed impact of a Section 333 liquidation?

A. That is the way I understand it.

Q. Okay. In view of the fact that the 333 liquidation was ultimately felt to be unfeasible—not feasible, wouldn't the bargaining—wouldn't the du Pont Company's bargaining power in the merger then be improved considerably?

A. Well, it was improved, and we bargained for a higher number, and we thought we took it to as high a number as we could given the circumstances.

Q. Well, if Morgan Stanley, the joint advisor, believed that a potential tax impact of, as I understand it, 69.5 million, or 2.84 percent, to Christiana would result from a then thought to be viable alternative and Morgan Stanley under those conditions felt that the maximum discount should be 2 percent, once that alternative disappeared do you think that Morgan Stanley's final report which raises the discount to 2.5 percent, or only another half a percent—do you think that that is a reasonable change of opinion, a sufficient recognition by Morgan Stanley of the circumstances as they then were?

A. We did, yes. As a matter of fact, it is strange to relate under these circumstances, but our great concern at that time was an argument made by the other side that said

[813]

that at 2½ percent there is substantial doubt that you can get an exemption order; that it is up to the Commission to look after the interest of the Christiana stockholders and 2½ percent is pushing things pretty far.

Q. Did you understand that the Commission was perhaps looking more closely at the consequences of the merger to Christiana?

A. No. The argument was simply that given the history of the Commission's administration of the Act, it was pushing things to the limit to get this up to around 2½ percent, and the argument was made by counsel for Christiana and we obtained an opinion from our counsel as to what their view of the law and the Commission's policies was, and it was based on that kind of advice, both financial and legal, that we wound up where we did.

Now, I would add to that if you go beyond the question of just the financial advisors and the legal advisors, that we also had a substantial view that if we pushed our luck much further the odds were pretty good that the Christiana management would find that it could not agree to higher terms and would walk away from the transaction.

Q. You felt that based on real evidence to that effect, or your own assumptions?

A. Our analysis of their situation. As we viewed it, they had advice from their counsel, they had advice

[814]

from their financial advisors. And if they accepted terms that went much beyond that kind of advice, they were taking a substantial risk that some of their stockholders would have decided they had been bad partners and would have brought litigation against them. And so our conclusion was that they didn't have much freedom to go beyond

where they were. And as the facts turned out, they were reluctant to go at 2½ percent. This was a very strange situation.

Q. Did you have an opinion as to what the actual tax impact to Christiana might be if 333 liquidation were effected?

A. No. As I understood the situation, one could not get an answer without first distributing the stock and then having the challenge come to the stockholders who had received the stock. And that seemed to me an impossibility because before you could distribute the stock you had to have consents from 80 percent of the stockholders to the distribution. It seemed to me they couldn't possibly consent without knowing the tax consequences.

Q. Mr. Grimes testified that he felt the actual tax impact to Christiana in a 333 liquidation might be in the $200 to $400 million range, or 10 to 20 percent of Christiana's assets.

A. I think if I remember his testimony he said he just reached out into the air and grabbed a number. At

[815]

least I don't know of any solid factual basis for arriving at a calculation.

Q. Was such a potential figure discussed at all?

A. Not that I know of.

Q. Not by you?

A. Not by me.

Q. Not discussed with you?

A. And not discussed with me.

Q. Inasmuch as Morgan Stanley's draft report seemed to rest heavily on the 333 alternatives in setting limits, when that alternative disappeared and the final report increased the discount by a half a percent, did you discuss

with Morgan Stanley whether they had taken sufficient cognizance of the changed circumstances?

A. Well, I think the sequence was the other way, Mr. Osheroff. As we went into the negotiations the numbers that we had before us were a discount of a half percent to 2 percent by Morgan Stanley plus 1.7 to minus 1.7 by Kidder, Peabody, and plus 1.1 to plus 3.7 by First Boston. And as you may recall, First Boston had no involvement with the 333 issue.

We chose a number as the only number we were willing to accept that landed right square in the middle, it so happened, of the First Boston range, and was higher than the ceiling that either Morgan Stanley or Kidder,

[816]

Peabody had used in their draft reports.

Q. Well, did you have that number in mind after the Morgan Stanley draft report but before its final report?

A. We had the 2½ percent in mind, yes.

Q. Yes.

A. Yes, we arrived at that number over the Fourth of July weekend.

And just to fill out this thing, so that you will understand the sequence, after the parties had been through the negotiations and we had finally gotten Christiana to agree to the 2½ percent, Morgan Stanley and the others were asked to then express a view as to whether that was a fair and reasonable number that didn't involve overreaching, and each did.

Q. Okay. Let me just clarify the chronology.

As of June 30th you have the Morgan Stanley draft report which sets a 2 percent discount limit. Around July 3d or July 4th you determined that the negotiating committees at du Pont—or both of you determined that the 2½ percent figure——

A. This is just du Pont.

Q. Just du Pont?

A. Just du Pont.

Q. Determined that the 2½ percent figure is perhaps a desirable one. And at that point you indicate to Morgan

[817]

Stanley what you determined? Or do you have their final report first?

A. No, we don't have their final report until the negotiations had been completed. The sequence is this. Let me see if I can run through it quickly.

Q. Okay.

A. On Friday, June 30th, the three financial advisors orally report their views. On that—well, we have two draft reports in writing, the Morgan Stanley and the First Boston. We do not have Kidder, Peabody. On that weekend, particularly on Sunday of that weekend, we met at Mr. McCoy's home and spent a better part of the day reviewing all the materials and all the alternatives we had and worked out what we thought was a sensible bargaining position for the negotiation that was to start the next morning. The next morning before we went into the negotiation we had a final meeting, having slept on the previous day's discussions, to be sure we were agreed as to what our course of action was. And to state it simply, we decided among ourselves that the best bargaining tactic was to arrive at a number that we thought was fair and reasonable and was compatible with the financial advice and the legal advice we had, to announce it, and to refuse to give any ground in the negotiation with Christiana.

We had two sessions with the Christiana people

[818]

back and forth before they finally acquiesced.

Q. So referring to the Morgan Stanley final report, the cover letter of July 7th therein, which states that Morgan Stanley in effect finds the discount arrived at by you satisfactory, and referring to the actual report setting forth its advice as to the ranges—both of these documents were prepared by Morgan Stanley after you had told them what you felt an appropriate discount was?

A. Well, I think—we told them what the parties had arrived at tentatively.

Q. Right.

A. And we asked for assurance that in the view of each of the financial advisors these were terms that they regarded as fair and reasonable. And each responded that way.

Q. But you did not have—referring to Morgan Stanley, you did not have Morgan Stanley's report in hand—final report prior to giving your views to it, as I understand the chronology.

A. That is correct. That is correct. We had it in hand before we made our recommendation to our managements.

Q. I see.

Judge Ullman: Off the record.

(Discussion off the record.)

Judge Ullman: On the record.

[819]

By Mr. Osheroff:

Q. Let's see, for clarification, Mr. Shapiro, there were two meetings of the du Pont negotiating committee with the Christiana negotiating committee?

A. That is correct.

Q. And could you give me the dates of those?

A. Monday, July 3, and Thursday, July 6.

Q. When was the recommendation made by your negotiating committee to the du Pont board of directors?

A. At our following board meeting, which would have been on the third Monday in July.

Q. And was the recommendation accepted at that time?

A. The board adopted a resolution agreeing in principle to the terms and leaving it to the team to put together the definitive documents to bring back for further action.

Q. You stated that at one point your negotiating committee was thinking of a higher number, I take it a higher discount.

A. Higher than 2 percent, yes.

Q. Higher than 2 percent. Did you have a number in mind which actually got knocked down after discussion with counsel?

A. No. We were at the 2½ percent range. As I remember it, we considered 2.3 for some reason which escapes my memory now. I don't know where we got the

[820]

fraction. But we wound up at 2.5 in a fairly lengthy discussion of the subject. And I think the main point I would make is that we were convinced that it was prudent to decide what the proper number was, everything considered, and to announce it, and not to use it as a bargaining tool.

Q. I believe you have previously testified with respect to the dispersal of the 28 percent block. I think it is on transcript 713—that you regard it of enormous value to stockholders, management and employees of du Pont.

A. Yes.

Q. Briefly, when you referred to the benefit to management, what are you thinking of?

A. I am visualizing those who come after us and are trying to manage the enterprise and see a block of 28 percent of the stock in the hands of people with no experience or understanding of the chemical industry and the problems that they must have to worry about in determining how to run the business and solve the problems that that kind of a block presents to them. Particularly if it should turn out to be a hostile block at some point in time.

Q. Right. If it were a hostile block, would that raise the specter of such things as proxy fights and fights for control?

A. It would.

Q. So one of the benefits would be to eliminate

[821]

the possibility of such struggles, I assume, control fights?

A. Yes, that is right. I think that one of the benefits would be that the stock would be held directly by the people who have the investment and you wouldn't have a block that others might be able to manipulate.

Q. In other words, the dispersal of the block effectively dilutes a potential for trouble?

A. That is one way of saying it, yes. I think I would rather say it in terms of dispersal of the block means that the people who have their investment in the company have control of their own stock and can act in their own self-interest.

Q. I believe that you testified that the benefits which may flow to the Christiana shareholders in the proposed transaction do not constitute any disadvantage, financial or otherwise, to the du Pont Company or its shareholders.

A. Yes.

Q. But wouldn't it be a disadvantage to the du Pont shareholders if the Christiana assets could be acquired for a lesser number of du Pont shares and if that alternative weren't utilized?

A. By definition that would have to be so. By the same token, if the deal slipped away it would be a serious disadvantage to the du Pont stockholders.

Mr. Osheroff: That is all I have, Your Honor.

[822]

Judge Ullman: Is there redirect?

Mr. Gribbon: No redirect, Your Honor.

Judge Ullman: Anything further? If not, you are excused, sir.

(Witness excused.)

Judge Ullman: We will be at recess until 2:10.

(Whereupon, at 12:40 p. m., the luncheon recess was taken.)

[823]

AFTERNOON SESSION.

(2:10 p.m.)

Judge Ullman: The hearing will please come to order.

Mr. Broderick: Your Honor, Christiana will call Mr. du Pont.

EDWARD B. DU PONT

took the stand, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Broderick:

Q. Will you state your name and address, please?

A. Edward B. du Pont, 4820 Kennett Pike, Wilmington, Delaware 19807.

Q. What is your educational background, Mr. du Pont?

A. I graduated from Yale in 1956 with a B.A. in economics, and from Harvard with an M.B.A. in 1959.

Q. Are you a member of the Christiana board of directors?

A. I am a member and have been a member since the summer of '71.

Q. Since the summer of '71?

A. Right. August 1971.

Q. Keep your voice up a little since I am pretty far away from you. I want to hear what you are saying.

Are you also an officer of Christiana?

A. I am assistant treasurer of Christiana since the

[824]

spring of '72.

Q. Were you a member of the so-called Christiana special negotiating committee?

A. I was.

Q. Who else was a member of that committee?

A. A. Felix du Pont, Jr., was a member.

Q. Can you tell us, Mr. du Pont, why you and Felix du Pont, Jr., were selected to be members of that committee?

A. We were selected by the board. Their feeling was the negotiating committee should consist of members who were not either directors or employees of du Pont Company.

Q. How many shares of either du Pont common or preferred do you own?

A. 100 shares of the common.

Q. Of du Pont common?

A. Of du Pont common, and no preferred.

Q. How many shares of Christiana common do you own beneficially?

A. Beneficially I own 140,142 shares of the Christiana common, and none of the preferred.

Q. Do you know how many shares of du Pont common or preferred Felix du Pont, Jr., owns?

A. Of the du Pont?

Q. Yes.

A. He owns 16,466 shares of du Pont common and none

[825]

of the du Pont preferred.

Q. Do you know how many shares Felix du Pont, Jr., owns of Christiana common?

A. He owns 134,797 shares of the Christiana common, and none of the Christiana preferred.

Q. Have you ever been employed by the du Pont Company?

A. Yes, I have.

Q. When was that?

A. I was employed from the fall of 1960 to the summer of 1967. I was first in the treasurer's department—I mean first in textile fibers department for about a year, and then I was in the treasurer's department until the end of

1966, and then I moved to the plastics department for a short while and then I resigned.

Q. Have you ever been an officer or director of the du Pont Company?

A. No, sir.

Q. To your knowledge has Felix du Pont, Jr., ever been an officer or director of the du Pont Company?

A. No.

Q. By whom are you currently employed, Mr. du Pont?

A. I am currently employed by the Wilmington Trust Company, and have been since 1967.

Q. And what position do you hold with the Wilmington Trust Company?

[826]

A. Currently I am trust officer in our trust department.

Q. In your capacity as a member of the Christiana special negotiating committee, did you at any time discuss the merger or the negotiations with anyone employed by the Wilmington Trust Company?

A. No, I did not.

Q. Outside of the context of formal negotiations between Christiana and du Pont did you at any time discuss the merger or its terms with any representatives of the du Pont special committee?

A. No. Only during our special meetings.

Q. Mr. du Pont, would you describe for us why in your opinion Christiana decided to explore the possibility of a merger with du Pont?

A. I think there were several reasons. I think one that several of us focused on was looking down the road a few years, that the management that would probably be coming along in Christiana were not active in the du Pont Company, the chemical business; let's say the family ties

in the company, in Christiana, probably weren't going to be there in the future. And we said perhaps Christiana had in some ways outlived its usefulness. And given that premise, perhaps we should look and see whether there were other material advantages to Christiana to merge in with du Pont.

[827]

Q. Prior to entering into formal negotiations with the du Pont special committee, did your committee—and by that I am referring to the Christiana special negotiating committee—did your committee have meetings to discuss various matters relating to the merger?

A. We had four meetings before we met with the du Pont people.

Q. And when did those meetings occur?

A. The first one I believe was May 15th.

Q. And some also occurred in June?

A. May 15th and June 6th and June 13th and June 27th. We had a total of four meetings.

Q. So there were four meetings prior to the commencement of negotiations?

A. Right.

Q. Now, without going into detail as to what occurred at each of those particular meetings, could you describe in general terms what you discussed and decided at those various meetings?

A. Well, I think right off the bat we decided we needed outside financial advisors, and of course outside counsel. And we retained Dechert Price and Rhoads, and we decided we would approach Kidder, Peabody to be our outside financial advisor. I believe that was the first meeting.

At the second meeting we agreed that we want to get

[828]

an appraisal done of the News-Journal, and that we along with du Pont would be willing to accept Mr. Manno as an appraiser if he were to take on the job.

And then we did—I am not sure if it was the second or third meeting, we thought we would like to have Morgan Stanley representing us as well as du Pont because we had had a long history of dealing with Morgan. And so we retained them on a joint basis with du Pont Company.

Q. Let me direct your attention to Kidder, Peabody for a moment.

During these four meetings that we are discussing did representatives of Kidder, Peabody attend any of those meetings?

A. They attended two. The last two meetings, June 13th, I believe, and June 27th. At the first meeting——

Q. Can you tell us what, if anything, Kidder, Peabody reported to you at the June 13th meeting?

A. At the June 13th meeting Mr. Gordon came down and gave us a preliminary talk and said that their preliminary thinking was that net asset value was the way to attack this problem and that their very tentative thinking was there should be no discount or no premium but they hadn't completely focused in on it.

Q. What about the June 27th meeting?

A. Yes. Then they came down again on June 27th and they

[829]

made firm their position was there should be no discount; if anything there should be a premium, but certainly no discount, and if they were pressed their range would be 1.7 down and 1.7 up.

Q. Did you understand, sir, how Kidder arrived at the figure 1.7? By that I am referring to the discount side of net asset value?

A. Well, I think under their—the 1.7 represented the amount of the taxes that would be paid under 333 merger as they understood at that time. So that was their floor below which they didn't think they could go. They were pretty strenuous about it being net asset value, right at parity.

Q. In other words, if I understand you correctly, you are saying that the 333 liquidation, or the possibility of a 333 liquidation led Kidder to the 1.7 discount. Is that correct.

A. I think that is substantially correct.

Q. When did you first learn that Section 333 was no longer considered to be practical or a feasible alternative?

A. Well, I think we learned finally once and for all on July 3d. It had been I would say dying a slow death before that. But as of our June 30th meeting it was at least being talked about. But it died over the weekend.

Q. In other words, it was finally buried on July 3d?

A. That is a better way to put it.

[830]

Q. Of what significance, if any, to you was the unavailability of a 333 liquidation?

A. The unavailability wasn't of really any significance to me. My personal view was that we ought to do this deal at parity, and as long as 333 was still viable it gave us some floor, a negotiating point to work from, it had some merit. But it didn't really affect my thinking. So when it finally was put to bed, I don't think it concerned me particularly one way or the other.

Q. Did you attend the meeting of June 30th, 1972, that had been testified to here by other witnesses?

A. Yes, I did.

Q. Would you describe for us what took place at that meeting.

A. Basically we just listened along with the du Pont negotiating team and lawyers—listened to the presentation of all three financial houses, what their views on the merger were. There wasn't any negotiation really at that meeting.

Q. When did the first negotiating meeting between the two special committees take place?

A. We met on Monday, July 3d.

Q. Would you describe, sir, what occurred at that meeting?

A. Well, first we had our—we did not have the financial advisors with us. There was some discussion of

[831]

the various assets involved and how they were going to be valued. And at some point during the day Mr. McCoy made the statement that he thought—or the team thought that 2.5 percent discount from adjusted net asset value was what they were looking for. But we allowed as how we were looking for parity. There was some discussion of this, and no decision was—on the discount part no decision was reached at that point.

Q. Did Mr. McCoy explain to you why he felt that a 2½ percent discount was appropriate?

A. Well, he said he thought that a discount was—2½ percent discount was appropriate in order to show all the stockholders and the du Pont employees that besides the other benefits there was a tangible, significant monetary value attached to this. And he thought he would have to have this in order to recommend it to his stockholders—or I guess to his board first and ultimately his stockholders.

Q. What was your reaction to the 2.5 discount figure?

A. Very unhappy. As I said, we were going for parity.

Q. And you were not happy with that discount?

A. I was not.

Q. Now, there has been testimony that the second negotiating meeting took place on July 6th between du Pont and Christiana. Prior to that meeting did the Christiana

[832]

special negotiating committee have a meeting itself?

A. Right. We met the morning of July 6th, Thursday morning, with our financial advisors and counsel and with all the non-du Pont Christiana directors except Halleck du Pont was not present, he was sick.

Q. Why was he absent?

A. He was sick, basically.

Q. And what was the reason for meeting with counsel, your financial advisors, and the non-du Pont directors?

A. Well, we wanted to review what had gone on in the previous two meetings with the du Pont people, and we—review what our financial advisors had said and see how 2.5 percent discount sounded to other directors. I mean if they were going to be violently opposed to it it would be one thing. But we ended up with their approval of 2½ percent if that is the best we could do, but they wanted us to certainly try for something less than that. We walked away with approval on the 2.5 at the meeting.

Q. As far as your non-du Pont directors are concerned, then, you had their approval to go to 2.5 if you had to but I take it their request, if that is the appropriate word, was to try to get it for less.

A. Right.

Q. At this meeting that you have been describing did you obtain an opinion from Kidder, Peabody as to their

[833]

view of a discount of 2.5 percent?

A. Yes, we did. And they said it was okay, and they preferred, everything else being equal, parity, but they would go along with 2.5.

Q. Did they tell you at that meeting that in their opinion a discount of 2½ percent would be fair and reasonable?

A. Yes, they did.

Q. You then had your next meeting with the du Pont special committee. Is that correct?

A. Right. We met that afternoon.

Q. Would you describe what occurred at that meeting, sir?

A. It would be short to say we struck out. But we tried to negotiate a lower discount. We came in first with a figure of 1.5 percent, trying to peg it on the previous Delaware Realty merger, and that didn't get very far. And we moved to 2 percent, and were equally as unsuccessful. And after a little conference among ourselves, we went ahead and accepted the 2.5 percent discount.

Q. So at the July 6 meeting you were still attempting to get something less than 2.5 percent?

A. Yes, sir.

Q. But you were not successful?

A. No way.

[834]

Q. Mr. du Pont, would you have agreed to a discount greater than 2½ percent?

A. No, sir.

Q. Why not?

A. Really two reasons. One, it was the—I am not sure of the order of importance, but one, it was the lower limit that our own financial advisor, Kidder, Peabody, was willing to go, and in my own thinking it was about as low as I was prepared to go. I thought we had given a lot away to get to there. We have given the newspaper away, we have given the Wilmington Trust away and we have given 188,000 shares of du Pont stock away. I thought that was enough.

Q. In other words, quite apart from financial advisors, your own personal opinion was that you had given away adequate consideration to accomplish the merger at 2.5 percent?

A. Yes, sir.

Q. Did the Christiana special negotiating committee feel any compulsion to merge into du Pont?

A. No. As I think I said, we had no reason to have to merge. We thought it was—we would take a look at it, but there was no compulsion on our part. We could have walked away—we would have walked away, I believe, if we hadn't gotten terms that we thought were fair and

[835]

reasonable to ourselves.

Q. Did the special committee, your committee, recommend approval of this merger to the Christiana board of directors?

A. Yes, we did. We sent two reports to them in July.

Q. Did the Christiana board approve the merger?

A. Yes, they did. They approved it I guess you would call it in principle on July 17th——

A. Let me stop you right there. On July 17th they approved it in principle. Were all Christiana directors present?

A. No, Halleck du Pont was not present.

Q. He was still ill?

A. He was still ill.

Q. Did the Christiana directors who were also du Pont directors participate in the July 17th meeting?

A. Yes, they did.

Q. And can you tell us why, sir?

A. Two reasons. One, our Delaware counsel said it was entirely legal and proper to have them attend the meeting, and it was also our understanding that they had not participated in any way in the du Pont side of the merger, and therefore could participate as a Christiana director.

Q. Were all directors present on December 18th when the agreement of merger was approved and executed?

[836]

A. Yes, they were all there then.

Q. Including Halleck du Pont?

A. Including Halleck. It was a unanimous vote.

Q. And it was unanimous?

A. It was unanimous, right.

Q. Mr. du Pont, did the special negotiating committee and the Christiana board of directors consider possible adverse market effect on du Pont common if it were sold following the merger?

A. Yes, we did. We considered it very early in the game.

Q. You say very early in the game. When was the first consideration?

A. I believe the first one was at April 28th, at our board meeting, and it was asked whether—assuming the merger went through, whether any of the Christiana directors were planning on selling any of their stock, Mr. Gemmill asked us this, and said if we did we better speak

up. And there was no mention of any selling—any contemplated selling.

Q. So no Christiana director indicated any intent to sell du Pont common. Is that right?

A. That is correct.

Q. Did any Christiana director indicate that he was aware of some other member of the du Pont family who might

[837]

wish to sell?

A. No. Nobody spoke up, said they knew of any selling by—any contemplated selling by anyone.

Q. Can you tell me approximately, Mr. du Pont, if you know, the total holdings of Christiana common which are owned by the Christiana board?

A. Approximately 1,900,000 shares.

Q. You say it was discussed a number of times. Wasn't the subject discussed at subsequent board meetings?

A. Every meeting we had from then on Mr. Gemmill brought up the subject, if anybody was going to—had any intention of selling, we had to know about it.

Q. And the answer was always the same?

A. The answer would always consistently be that none of the directors were going to and they did not know of anybody in their own knowledge who was going to sell.

Q. Do you yourself know of anyone who may wish to sell du Pont common?

A. No, sir.

Q. Was the matter discussed at the December 18th meeting when the final agreement was approved?

A. It was again, with the same result.

Q. Mr. du Pont, when did you first learn that Wilmington Trust Company had no present intention to dis-

pose of du Pont common they would receive if the merger were

[838]

approved?

A. I believe it was in the latter part of June I was advised by our counsel that Wilmington Trust was not going to sell—or had no intentions of selling except in like an estate problem or something like that.

Q. Except in what kind of a problem?

A. Except like if it was an estate problem where they had to raise some funds. But as an investment they had no intention of selling.

Q. What do you personally—assuming this merger is approved, what do you personally intend to do with du Pont common stock you receive?

A. I plan to continue holding my du Pont stock. I think it is a fine investment, and I wouldn't dream of selling any of mine.

Mr. Broderick: Cross-examine.

Judge Ullman: Mr. Collins?

CROSS-EXAMINATION.

By Mr. Collins:

Q. Mr. du Pont, does Christiana Securities Company control du Pont?

A. No, sir.

Mr. Collins: No further questions, Your Honor.

Judge Ullman: Mr. Murtaugh, do you have questions?

Mr. Murtaugh: Yes.

° ° °

[870]

By Mr. Anderson:

Q. ° ° ° first you had heard of the possibility of a merger of Christiana Securities Company into du Pont Corporation?

A. I would say it was the first formal discussion of it. I think at other times—I can't document it—we said some day we ought to think about a merger or some day we ought to perhaps explore it carefully. But it certainly wasn't taken up specifically at other board meetings to my knowledge as a—you know, an item on the agenda or something like that.

Q. And to the best of your recollection was it a subject that had been informally discussed for many years?

A. I can only speak for the time I was on it, but we do know it was discussed back in, what was it, '61.

Q. Now, is it your testimony that the board of directors authorized Mr. Irenee du Pont to send the letter to the du Pont Corporation proposing the merger?

A. I am not sure that authorized is the right word. I know they were polled and I assume gave it their blessing. We didn't have a formal board meeting beforehand —before the letter went out. I believe he contacted everybody that was in town.

Q. Mr. du Pont, to clarify what may or may not be clear on the record now, do you know of any plans on the part of the present holders of Christiana securities to dispose in any way of the common stock of du Pont Corporation

[871]

to be received by them because of this merger?

A. I do not know of any plans of any of the Christiana directors to dispose of their stock.

Q. It is your understanding that their present intent is to hold the securities they receive in the du Pont Corporation?

A. Yes, sir.

Q. Did the du Pont board make the decision—excuse me. Did the Christiana board make the decision to select Kidder, Peabody as its financial advisor?

A. No, sir. The special committee, Felix du Pont and I made the decision.

Q. And how did you make that decision, please?

A. We looked at two things. We wanted, one, a firm that we thought was very well respected and astute, if you want to call it, or a well-known financial house, and one that had not had substantial—that is not the right word—but dealings with du Pont Company, so there woudn't be any—it would be a completely arms'-length transaction. We went to Kidder, Peabody and asked them and they agreed.

Q. Did you have an assistance in making that selection of any type of a staff or legal advice?

A. We certainly talked to our counsel, Dechert Price and Rhoads. And they certainly approved of it.

* * *

[879]

* * *

Judge Ullman: Mr. Gribbon?

Mr. Gribbon: Du Pont is prepared to call Mr. McCoy to the stand.

CHARLES B. McCOY

took the stand, and having been first duly sworn, testified as follows:

Mr. Gribbon: I might observe at the outset, Your Honor, that perforce there will be a degree of duplication between Mr. McCoy's testimony and that of the

[880]

other negotiators since they were involved in the same matter. I will do my best to minimize that and confine his testimony to matters that are new and germane to the proceeding. But I warn you there will have to be some degree of duplication.

Judge Ullman: I wish you luck.

DIRECT EXAMINATION.

By Mr. Gribbon:

Q. Would you please state your name and address?

A. Charles B. McCoy, 700 Snuffmill Road, Wilmington, Delaware.

Q. What is your position with the du Pont Company?

A. Chairman of the board, president, and a director.

Q. Are you also a member of the executive committee?

A. Member and chairman of the executive committee. Member of the finance committee.

Q. For how long have you been employed by the du Pont Company?

A. A little over 41 years.

Q. Have you spent your entire business life with the du Pont Company?

A. My entire business life, yes, sir.

Q. In what major capacities have you served with the du Pont Company?

A. In major capacities, I have been the general

[881]

manager of one department, the assistant general manager of two departments, a member of the executive committee and finance committees.

Q. What was your education prior to coming to du Pont Company?

A. A B.S., University of Virginia, 1930. Master's, M. I. T., 1932.

Q. What operating departments of the du Pont Company did you refer to in your previous answer to my question?

A. Engineering department—well, I can name a couple that were not operating departments by our definition. Engineering department, foreign relations department, purchasing department.

Q. Which departments were you general manager and assistant general manager of?

A. The electrochemicals department, assistant general manager; general manager of the elastomer chemicals department; general manager of the explosives department.

Q. When did you go on the du Pont executive committee?

A. 1961.

Q. Have you been on it continuously since that time?

A. Yes, sir.

Q. Did you at one time become president of the du Pont Company?

A. Did I become president?

[882]

Q. Yes.

A. Yes. A little over five years ago.

Q. Five years ago. Now, have you ever been an officer or director of Christiana?

A. Never.

Q. Do you presently own any stock in Christiana?

A. No, sir.

Q. There has been considerable interest in this proceeding, Mr. McCoy, in 40 shares of stock in Christiana which at one time you owned. Would you tell us briefly about those 40 shares?

A. I gave it to my grandchildren. I hope they still have it.

Q. When did you make that gift?

A. Shortly after these negotiations were undertaken.

Q. And what was the reason for making the gift at that time?

A. Because we thought that even that small amount might make a ripple and it wouldn't be worth the difficulty.

Q. Are you a stockholder of the du Pont Company?

A. Yes, sir.

Mr. Gribbon: I would like the record to note at this point, Your Honor, that in du Pont Exhibit 5, pages E-1 and E-3 of that exhibit projects Mr. McCoy's substantial interest in the du Pont Company.

[883]

By Mr. Gribbon:

Q. Do you recall receiving a communication from Mr. Irenee du Pont in April of 1972 suggesting on behalf of Christiana that du Pont give consideration to the merger?

A. I do.

Mr. Gribbon: That, for the record, is Joint Exhibit 1. I believe—2. Joint Exhibit 2.

By Mr. Gribbon:

Q. Prior to receipt of that letter had you had any communications or discussions with Mr. du Pont about the possibility of a merger?

A. No, sir. Nothing of a serious nature.

Q. Had you had discussions with any Christiana representatives prior to receipt of this communication?

A. No.

Q. Had you prior to receipt of this Christiana proposal of April 20 given any consideration within the du Pont Company to the possibility of a merger with Christiana?

A. We never made any study at all to my knowledge. They may have done it some years back but not in recent times to my knowledge.

Q. Aside from the study had there been any discussion or consideration of the advantages or disadvantages of such a merger?

A. No. No, sir.

[884]

Q. What actions did you take upon receipt of the Christiana merger proposal in April of 1972?

A. I immediately got in touch with Mr. Shapiro, who has the responsibility for liaison in our company in both the treasurer's and the legal departments, and showed him the letter, and we discussed its possible import and the best way to try to organize ourselves to analyze it and to see whether or not there was a possible plan that would be of value to us.

Q. Did you submit the proposal to anyone other than Mr. Shapiro?

A. The first meeting of the executive committee following that the letter was submitted to the executive committee for their consideration and analysis, with my recommendation that we set up a committee consisting of Mr. Shapiro and myself to deal with it.

Q. And was such a committee established?

A. It was established.

Q. In the meeting of the executive committee was there any opposition to the merger expressed?

A. No, sir. There was not enough known about it for anybody to take a position one way or the other.

Q. Were you favorably disposed towards the merger?

A. I was disposed favorably toward a solution of what I thought was a long-term Christiana problem, yes.

[885]

Q. What do you mean a solution of a long-term Christiana problem? What do you have in mind in using those terms?

A. I had in mind only in a very general way the long-term composition of the board of the du Pont Company. And knowing the difficulties of obtaining the kind of board that a major corporation needs these days, I was concerned that what would be the position way out with respect to the Christiana group. And this seemed to me to present the possible solution to that problem, if it developed to be a problem. I had no way to tell.

Q. How would you anticipate it to be the solution to the problem you have described?

A. Well, the only way that it could be a solution would be if the block itself were broken up so that it was not there as a target for somebody to go after or would not fall into the hands somewhere down the line of either a group of people who would be unable to discharge the responsibility that went with it or might have serious dif-

ferences of opinion and lead to factional representation.

Q. In your proxy statement, Mr. McCoy, in past years there has appeared the statement that du Pont denies that it is controlled by Christiana. What do you mean by that statement?

A. Well, that statement I think has been in our

[886]

publication for many years, and it refers to the denial of control in the sense that, as I understand it, it is interpreted by the SEC. And in my view, it has a strictly legalistic sense and does not represent the facts of operation of the du Pont Company.

Q. Does Christiana tell you how to run the du Pont Company?

A. I have never had an instruction, a mandate, or anything that suggested that they did.

Q. Has Christiana ever vetoed any action that you wanted to take in the du Pont Company?

A. No, sir.

Q. To what extent does Christiana have any influence in the du Pont Company?

A. Christiana has an influence only through the people who may be stockholders of Christiana who are on our board and who may have served in the company. But their position in the company is based on their performance in the company, not on their position in Christiana.

Q. What persons do you have in mind and what positions in giving your previous answer?

A. Well, I have in mind, of course, my immediate predecessors, of whom three are still living. Walter Carpenter, Crawford Greenewalt, and Lammot Copeland.

Q. Are they still serving with the du Pont Company?

[887]

A. They are still on the board of the du Pont Company, yes, sir.

Q. And do they serve on any of the committees of the company?

A. Lammot Copeland is on the finance committee, as is Crawford Greenewalt, who is, as a matter of fact, chairman of the finance committee.

Q. Are there other Christiana directors that serve on the finance committee of du Pont?

A. Yes, I think that is—I don't know, Hugh Sharp, I think his brother is a director. I think they would be the ones who are co-directors, but it is right in the record.

Q. Mr. Irenee du Pont is on the du Pont executive committee?

A. He is not on the finance committee.

Q. He is on the du Pont executive committee?

A. Yes, sir.

Q. And he is a director of Christiana?

A. He is the president of Christiana.

Q. Other than Mr. Irenee du Pont, are there any Christiana directors on the du Pont executive committee?

A. No, sir.

Q. Were you aware, Mr. McCoy, that the consummation of the merger of du Pont and Christiana would give substantial benefits to the shareholders of Christiana?

[888]

A. That was pointed out in Mr. Irénée du Pont's letter.

Q. Was the securing of such benefit to the Christiana shareholders a reason for your being favorably disposed to consider the merger?

A. Nothing to do with it.

Q. Was it an adverse factor in your opinion?

A. Well, I should think it makes it more difficult to arrive at a fair bargain that is attractive to all stockholders.

Q. What did the special negotiating committee—what actions did it take in its examination into the proposed merger?

A. Well, the competent group were called together—well, in the first place, Mr. Shapiro and I had an agreement that inasmuch as he was much more directly connected by both experience and training, with the financial and legal aspects of this problem, that he would sort of quarterback the day-to-day affairs, keeping me fully informed and posted on any problems that arise, or also the progress of the study. And then we agreed that with the help of our legal and treasurer's people we would try to identify all factors, call in outside experts, and try to analyze the problem as thoroughly as we could.

Q. During the course of these explorations did you have

[889]

any discussions with members of the Christiana board, major stockholders of Christiana, with respect to the merger?

A. None at all.

Q. Was the appointment of the special committee approved by the du Pont board of directors?

A. It was approved by the du Pont board of directors at the meeting immediately after the—first following the meeting of the executive committee.

Q. That presumably would be the May meeting of the board of directors?

A. Yes.

Q. Was there any extended discussion of the merger at that May meeting?

A. No, there was not an extended discussion, because there was nothing to discuss at that point. We told them the steps we had taken and that we would report back just as soon as we had anything of value—of interest.

Q. The record in this proceeding shows that the two negotiating committees jointly retained Morgan Stanley as a financial advisor, and that du Pont in addition retained First Boston as a financial advisor. Why did the committee seek the advice of a second banker?

A. Well, in the course of our discussions among ourselves we thought that Morgan Stanley would bring to the negotiations a long background of some of the problems

[890]

and history on both sides. We had also had very favorable experience with them over the years in the quality of their advice, and so we thought they were a natural. But we thought that in order to get as much assurance as we could of the fairness of the negotiations, that it would be very wise to get somebody of great reputation on the outside who had had no prior dealings with us and could look at it as strictly a financial transaction.

Q. Had du Pont had any prior dealings with First Boston Corporation?

A. To the best of my knowledge, none at all.

Q. Did you, Mr. McCoy, attempt in any way to influence First Boston or indicate to them what you thought the outcome of their advice ought to be?

A. No, sir. I had one meeting with the First Boston people before they came down to present their views which was in the nature of a sort of a social luncheon so that as I looked at it, we as principals could get to know each other a little bit. But beyond that, nothing.

Q. To your knowledge, did any of your advisors, either within the du Pont Company or without, attempt

to indicate to First Boston how they should come out on this problem?

A. I should certainly think not.

Q. The engagement letter to First Boston indicates

[891]

that you asked them to advise you as to terms that would be fair and reasonable to both parties and that did not represent overreaching. Why did you ask for that kind of advice?

A. Well, as I understood it, the letter of that follows the pattern of the applicable laws of the SEC, as well as my own feeling—personal feeling that that is the only kind of an arrangement that you could live with.

Q. You mean you didn't want to be involved in an arrangement that was overreaching?

A. I certainly do not.

Q. You were aware that this transaction had to be approved or submitted to the Securities and Exchange Commission?

A. That gave me a great deal of comfort.

Q. Did the directors of du Pont who were also directors of Christiana or owners of Christiana stock participate in the consideration of the merger on the du Pont side in any way?

A. Did the Christiana people participate on the du Pont side?

Q. Yes.

A. No, sir, they were excluded.

Q. What steps were taken to isolate them from the transaction?

[892]

A. When there were meetings of the—of course in the internal meetings with Mr. Shapiro and Mr. Grimes and

Mr. Welch, other members of both the treasurer's and legal department, there were none of them ever present. At the meetings of the executive committee, when we reported progress or decided to discuss in any informal way the problems in connection with this potential merger, Mr. Irenee du Pont was excluded, and the same applied at board meetings. The directors—du Pont directors who were either directors of Christiana or shareholders of Christiana were asked to leave the boardroom.

Q. Was the finance committee asked to consider the merger?

A. The finance committee was not considered because of the fact they—because they were largely Christiana members.

Q. So the merger was not even submitted to them.

A. It didn't seem to us to be the right place to consider it.

Q. Would a transaction of this nature normally have been referred to the finance committee?

A. Normally any important financial matter is cleared with the finance committee, yes.

Q. But in this case there was no finance committee consideration whatsoever.

[893]

A. No, sir.

Q. Now, as you considered the terms on which this merger might be carried out, and before receiving any financial or legal advice, did you believe that you should on behalf of the non-Christiana du Pont shareholders attempt to extract from Christiana some substantial participation in the financial benefits flowing to Christiana?

A. No, I looked at the problem as one of trying to arrive at a solution that would be fair to the du Pont stock-

holders, totally, and that the result as far as Christiana themselves was concerned was their affair. Our affair was to make sure that the du Pont stockholders didn't suffer any disadvantage and that if there were a merger that it would be under such terms as there would be no question in the minds of our stockholders or of the people in Washington that it was fair and square.

Q. Did you see your du Pont stockholders other than Christiana suffering any disadvantage as a result of this merger?

A. I do not.

Q. In your view did the benefits flowing to Christiana shareholders cost the non-Christiana shareholders of du Pont anything?

A. If the merger goes through——

Q. Yes.

[894]

A. I—no, just the reverse. I think it is a benefit, great benefit to the du Pont stockholders.

Q. Now, when you did receive advice from your financial advisors, particularly your outside financial advisors, did such advice confirm or alter your view as to the propriety of extracting a portion of the benefits from the Christiana shareholders?

A. Well, it didn't really raise the issue, in that Morgan Stanley—First Boston, when we discussed this famous liquidation route, paid no attention to it. They felt that it had no bearing on the problem. They were the only ones with whom we discussed the terms prior to the negotiating session.

Q. Well, now, at the negotiating session did you understand that Morgan Stanley advised that du Pont should properly share in the financial benefits going to the Christiana shareholders?

A. No, they did not take that position.

Q. Did First Boston take that position?

A. No, sir.

Q. Did the legal advice that you received regarding this transaction alter or confirm your view as to the propriety of extracting some portion of the benefits——

A. The legal advice, as I interpret it, gave no

[895]

importance to that at all, and said that it was not a factor in the decision—should not be a factor in the decision.

Q. Did you regard the discount which was ultimately negotiated as a sharing by the du Pont shareholders in the financial benefits going to the Christiana shareholders?

A. No, sir.

Q. What did you regard that discount as?

A. I regard that discount as in line with the practice in the past of any mergers that I have heard about that were in any way comparable. I regard it as fair in the eyes of the best professional advice that we can get from either legal advisors or financial advisors, and I regard it as fair to our stockholders as some justification for going through this rather long-drawn-out set of negotiations.

Q. Were you kept informed as to the progress being made by the financial and legal people who were developing recommendations for your committee?

A. I was.

Q. On a day-to-day basis were you involved?

A. I would regard it on a day-to-day basis, although certainly there were sometimes two or three days when I wouldn't even think about it.

Q. How did you and Mr. Shapiro share this burden?

[896]

A. Well, as I think I tried to explain earlier, he was much more intimately connected with it on a going-

forward basis, but we are only a few steps apart and no distance by telephone, so that we had a very good working relationship.

Q. Did you prior to the meeting of the entire negotiating group on June 30 confer with Morgan Stanley, the advisor that was hired jointly by you and Christiana?

A. No, sir, I did not.

Q. When did you first learn the views of Morgan Stanley as to the terms that would be fair and reasonable here?

A. When they stood up that morning and presented their view.

Q. That is the morning of June 30?

A. The morning of June 30, yes.

Q. Did you make any effort in advance to influence Morgan Stanley in the views that it was expressing on this merger?

A. I had no contact with them at all.

Q. To your knowledge did any of the du Pont representatives make any effort to influence Morgan Stanley to any particular view on the merger terms?

A. I am satisfied they didn't.

Q. Did you confer with First Boston prior to the June 30 meeting?

A. We conferred the night before. We had quite a

[897]

long evening session with them, at which time they presented their analysis of the problem, the recommendation that they would make to us as our consultants.

Q. And do you recall whether that recommendation presented that night changed later or remained firm?

A. It has been firm from start to finish.

[898]

Q. It hasn't been altered by any subsequent developments?

A. No, sir.

Q. Did the discount that was ultimately agreed upon by the negotiating teams fall within the range recommended by First Boston?

A. It fell within the range.

Q. Now, directing your attention to that meeting with First Boston which would have been I believe on the evening of June 29th, do you recall if there was any discussion of the possible impact of the merger upon the market value of du Pont stock?

A. There was a discussion of that, and they took into account looking at it as a straight investment problem and assured us that they see didn't see any market impact.

Q. Prior to that meeting, Mr. McCoy, did you personally have any apprehension as to an adverse market impact on the value of du Pont stock?

A. Well, I had given it thought from my own personal point of view, tried to analyze it. I am not a security market man. But having some holdings of du Pont I was quite interested to arrive at my own personal conclusions on it.

Q. What were those conclusions?

A. That it would have no impact.

Q. What did you take into account in arriving at your own personal conclusion that it would have no impact?

[899]

A. Well, I know the history pretty much of the holdings of du Pont and Christiana over the years. I know that it is not trading stock in any sense of the word. I know that therefore, as does mine, it has a very low base.

I know the difficulty of trying to figure out how you can take a 30-percent licking and pay two commissions and reinvest the proceeds in a more attractive security. I have great respect for the securities market and its ability to absorb offerings. And the fact that it is very difficult to produce bargains by manipulation of the market.

Q. Were you aware of any plans on the part of Christiana shareholders to make substantial or significant dispositions of du Pont stock upon consummation of the merger?

A. No, sir, I was not aware of it. And it was discussed a number of times as to whether or not that was a factor, and I was assured that it was being checked out and that there was no plans. Furthermore, that this would be clear by the time we came to Washington.

Q. Had you personally talked with the major Christiana stockholders as to their intention with respect to possible sales?

A. No, sir.

Q. Why not?

A. Well, I just don't consider that that was any part of my approach. I was not discussing this merger with

[900]

them in any way.

Q. With whom were the du Pont people discussing the merger?

A. The merger discussions before the negotiations were all between counsel.

Q. And was that by design, that the discussions were limited to counsel rather than the principals involved?

A. It was agreed.

Q. And what was the purpose for that arrangement?

A. To make sure that there weren't any misunderstandings or that there was no undue influence or any

chance to take steps that would not fit into the sensible approach.

Q. You stated that you were advised, however, that the matter of possible sales by the Christiana shareholders was being checked into. Who was doing that checking so far as you know?

A. Excuse me. Would you repeat that? I was—

Q. I say you testified earlier that while you made no inquiries you were advised that the question of whether Christiana shareholders did intend substantial sales was being checked into. Who was doing that checking?

A. I understood that it was being checked by Christiana's counsel.

Q. And what did you understand the answer to be?

A. I understood it was the negative.

[901]

Q. Were you aware that it was contemplated that a significant number of Christiana shareholders would be given registration rights which would enable them to sell under certain conditions their stock?

A. Yes, sir.

Q. Did you draw any inference from that as to the prospects of substantial sales?

A. No. I think that that has been as a matter of business practice in mergers.

Q. At this meeting on June 29th, what view did First Boston express to you as to the possible impact of the merger on the value of du Pont stock?

A. They expressed very strongly the view that it would not have any impact. Perhaps favorable.

Q. Was this an offhand expression, or do you recall to what extent it was discussed at this meeting of June 29th?

A. Well, I can't recite the questions or remember the length of the discussion, but it was quite a detailed discussion all during the evening, one factor after another. And this was one that they had been asked to consider, and it was reviewed at that time.

Q. Do you recall whether thereafter Morgan Stanley expressed a viewpoint as to the possible market impact on the du Pont stock?

A. At the presentation the next day I believe they

[902]

covered that, yes. That it would have no impact.

Q. It would have no impact?

A. Oh, well, it would have perhaps a temporary impact but they didn't consider it as an important factor in the merger negotiations.

Q. Did you then in going into these negotiations feel that you had to bear in mind as a significant factor the prospect of an adverse impact on the market value of du Pont stock?

A. I did not.

Q. Turning now to the first meeting of the negotiating committees, which I believe it has been testified to was held on June the 30th, a Friday, was any negotiating done at this session?

A. No negotiating at that session.

Q. What in substance transpired at this time?

A. That was a presentation first by Morgan Stanley, second by First Boston, and third by Kidder, Peabody of their analyses of the problem, recommendations for its solution, ranges, with the exception of Kidder, Peabody who didn't come up with a range, at first, anyway. And there were I think questions of fact or interpretation as the presentations were made, but no negotiation between

the negotiating committees. Nor were there any remarks made that could have been construed as negotiating.

[903]

Q. Did each banker who presented his position expose himself to questions from the assembled group?

A. That's right.

Q. When did the first negotiating session take place?

A. On July 3rd, the following Monday.

Q. The following Monday. And who was in attendance at that meeting?

A. At that meeting the two negotiating committees, their legal counsel. We had some of the people from our own Treasurer's Department. I think that is all. There were no bankers there.

Q. Do you recall Mr. Shapiro's testimony this morning as to what transpired within the du Pont committee between the June 30th session and the July 3rd session?

A. That's right.

Q. Do you see any reason to disagree with his recital of the events?

A. No. I think it was very accurate. It was a long weekend.

Q. Do you recall that during that weekend there were developments with respect to this possibility of a Section 333 liquidation?

A. That was discussed at our meetings over that weekend, that it seemed to be dropping out and the chances are that it would be acknowledged by the time we got to the meeting on

[904]

the 3rd.

Q. What impact, if any, did the demise of Section 333 in this matter have upon your committee's deliberations as to the terms?

A. I would think the only impact was that it gave us the confidence that our number would be a saleable one.

Q. Would you elaborate on that. Why did it give you that confidence?

A. Well, Mr. Shapiro and I had discussed this liquidation possibility amongst ourselves over the course of our consideration and we were inclined to discount it and to figure that it was really a method of—it was just an additional factor that was being presented by the Christiana people to indicate that they could run to that if necessary. And although I had no personal knowledge of the legal complications, it sounded like a very clumsy and difficult way to handle it. So I wondered just how serious they really were about it.

And if in fact it was acknowledged not to apply, then I thought, well, that is just one more argument on their side that is eliminated.

Q. To what extent did the three bankers in rendering their views on the previous Friday, June 30, as you heard the matter, lean on the Section 333 liquidation?

A. Well, First Boston gave it no weight at all. Morgan Stanley did give it some weight, apparently. They

[905]

certainly cited it. And of course Kidder, Peabody thought that it was a very viable alternative.

Q. Now, did your negotiating committee agree upon some kind of a proposal to put before Christiana before going into the first negotiating session on July 3rd?

A. We tried to figure over the weekend—and we were in possession of the recommendations of both the legal and financial people—what would be the fairest number that we could come out with that would stand all the tests, both from our own stockholders and the SEC, the

Bureau of Internal Revenue, our own consciences, anything else that we could think that would represent a fair transfer agreement. And we thought that—I particularly thought that in my position as chairman that I would have to come out with a figure which I thought was fair, and unless something new was introduced, that I would stick to it. I didn't want either side to think that I had been pushed, or that we had been pushed just by bargaining techniques. And in arriving at a range there was no black and white answer; it had to be a matter of judgment, and this was a figure that we would have to name and stay with.

And balancing the recommendations made by the financial people, we realized that it was above the Morgan Stanley level on the basis of their knowledge of the facts at the time they put it together, it was of course above Kidder, Peabody's

[906]

and it was below the top of the range that had been recommended by First Boston. But it was I thought the fairest number we could come up with. It was a little higher than any that I had heard recited in the past. I thought it might bother them a little bit, but if they had some time to think it over there was a very good chance that they would not walk away. And I was most anxious to see this go through.

Q. And what is the figure that you came up with going into the first negotiating session?

A. 2.5.

Q. 2.5 percent discount from net asset value?

A. Net asset value.

Q. Was this intended to be a bargaining figure?

A. No, sir.

Q. Was it in fact a bargaining figure?

A. Well, I heard somebody refer to it earlier as an ultimatum. I didn't like to think of it as that. I thought we could justify it. And if you are dealing with trying to set a number in a range, it is always a bargainable number, I suppose, but we thought that in these conditions our strongest position was to figure out what we thought was right and stay with it.

Q. Why didn't you offer a figure at the upper part of the range of your advisor First Boston? The figure you did offer was sort of mid-way in that range, was it not?

[907]

A. Yes. I thought we had stretched it pretty well above the limits that the other two advisors had indicated. I thought it was a little bit above anything that—any history, that we could produce. I thought the number was substantial, and that it was fair. So whether we could have gotten another tenth, I don't know, but we were certainly thinking in tenths.

Q. Would you briefly describe the course of negotiations at your meeting of July 3rd. This is the first negotiating session on the Monday.

A. Well, after the usual pleasantries, Mr. Shapiro opened with the comment to the other side or the question to the other side whether they still attached any value to the ultimate solution to the problem, and after some scrambling they said no. And that cleared the air on that.

And then I don't remember just the exact sequence, but everybody seemed to look to me to make some sort of a comment, and I tried to outline the mental processes we had been through and to justify in the eyes of everybody there a discount of 2.5.

Q. What was the reaction to your proposal of 2.5 from the negotiating committee of Christiana?

A. Well, they seemed to regard it as high, and they cited the Delaware Realty settlement, they cited all the other information that has been brought out during this testimony

[908]

as to lower rates. And I think that they finally left it that they would have to go off and think about it, and the meeting broke up on that—with that understanding. Oh, of course there was considerable discussion following that of all the other points that are involved, in the treatment of preferred stockholders, the difficulties with the bank, the difficulties with the newspaper. But they were all relatively—they were great points to discuss but they really didn't make or break the transaction.

Q. Did Christiana make any counter-offer at that meeting?

A. Not a serious one that I regarded as serious. They were obviously thinking in the one-and-a-half range.

Q. Did you recede from your 2½ percent discount figure?

A. No, sir.

Q. The next meeting appears to have been on Thursday, July 6th. Do you recall that?

A. I do.

Q. Would you tell us briefly the substance of that meeting?

A. Well, between the two meetings we had had a meeting of the executive committee and Mr. Shapiro and I reported to the executive committee in full detail—this is the executive committee absent Irenee du Pont—the progress of the negotiations. And this is a customary practice with us. Make sure that all the other men at that table had a

[909]

chance to think it over and to give us any advice or instructions or help that they could.

There was no alternatives, no suggestions made that would lead us to change our position, and so we then returned to the July 6th meeting with the satisfaction of knowing that that group was strongly behind us.

Q. And then at the July 6th meeting when you were across the table from the Christiana negotiators what transferred?

A. Well, the Christiana people as I recall asked us to explain once again how we had arrived at our numbers, which we tried to do, and that was largely a repetition. There were no new factors. They then suggested that two percent was really as high as they thought they should go. And we left the room, as I recall or they did—I don't remember which it was—and we checked it over some more and decided, no, there was nothing had been introduced that would cause us to change our position. We returned and told them that, and after considerable debate among themselves they indicated that they would recommend it to their board.

Q. Was that essentially the end of the negotiations between the two special committees?

A. Yes, sir. With the exception of the other line of—the other series of problems that I have referred to.

Q. Do you recall what considerations were put forward

[910]

by the Christiana people in support of two percent rather than the 2½ percent?

What, by the way, is the difference in dollars between 2 percent and 2½ percent in this transaction?

A. Well, I can work it by proportion, I guess. It ought to be a half of—it is 25 percent of the $55 million.

Q. Why, if you recall, were they pursuing the 2 percent discount?

A. Well, I think they stuck to that because that had been the top of the range that Morgan Stanley had come in with, and it was above their 1½ figure dating back to Delaware Realty, and it exceeded the 1.7 that Kidder, Peabody had originally recommended as a top.

Q. Now, sir, you have related that at the time negotiations commenced on July 3rd both negotiating teams were fully advised as to the views of the three banking groups. Is that correct?

A. On July 3rd.

Q. Yes. When you commenced your negotiations.

A. They were advised, yes.

Q. On June 30th, the three bankers each laid down what his views were.

A. That is right.

Q. So you knew what Christiana had been advised by Kidder, Peabody, and Christiana knew what you had been advised

[911]

by First Boston. And both of you knew what Morgan had advised.

Is that a normal procedure, in your experience: that both parties to the bargain will be advised of what their financial consultants have told them?

A. No, I don't think it is. I think it is quite unusual, but I think this was an unusual transaction.

Q. Why were those arrangements?

A. In order that everything could be absolutely on top of the board.

Q. Did you have in mind the requirements of the Investment Company Act of 1940 among other things?

A. I have in mind the Investment Company Act, 250,000 stockholders, and our general public, yes, indeed.

Q. Have you discussed the terms of the merger with any of the directors or major stockholders of Christiana during the course of negotiations, or since?

A. No, sir.

Q. Have any of the directors or major stockholders of Christiana in any way suggested to you other than through the special negotiating sessions what the desirable terms to Christiana would be?

A. Never.

Q. In your judgment are the terms that have been agreed upon for the merger fair and reasonable to the du Pont Company and to the shareholders of du Pont other than

[912]

Christiana?

A. I think they are fair and reasonable to all parties.

Q. Have you in negotiating this merger on behalf of du Pont been motivated in any respect by a desire to benefit the Christiana shareholders?

A. Not at all.

Mr. Gribbon: That concludes the direct examination, Your Honor.

Judge Ullman: Very well. We will suspend until 10:00 o'clock tomorrow morning for cross-examination.

(Whereupon, at 4:50 p.m., hearing in the above-entitled matter was adjourned, to reconvene on Tuesday, February 13, 1973, at 10:00 a.m.)

[913]

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

—

File No. 3-3928

—

In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware, 19898

(812-3224)

Investment Company Act of 1940

—

Hearing Room 876
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C.

Tuesday, February 13, 1972

Hearing in the above-entitled matter met, pursuant to adjournment, at 10:00 a.m.,

BEFORE:

SIDNEY ULLMAN, Administrative Law Judge.

APPEARANCES:

(As heretofore noted)

[914]

PROCEEDINGS.

Judge Ullman: The hearing will please come to order.

I believe we are ready for commencement of cross-examination of Mr. McCoy.

Mr. Gribbon: Yes, Your Honor.

Whereupon,

CHARLES B. McCOY

resumed the witness stand, and, upon examination testified further as follows:

Judge Ullman: Mr. Collins, do you have cross-examination, sir?

Mr. Collins: Yes, Your Honor.

CROSS-EXAMINATION.

By Mr. Collins:

Q. Mr. McCoy, going back to the time that you received the letter of April the 20th, I believe it was, from Mr. du Pont, suggesting the possibility of a merger—going back to that time, I understand that you went about selecting a negotiating committee to represent du Pont. Is that correct, sir?

A. Yes, sir.

Q. Now, in going over in your mind what people would be on that committee, did you give any thought to the fact that you would be negotiating with Christiana, that was the

[915]

essence of the negotiation? Now, did you consider the fact that you did have outside directors on the board?

A. That's correct.

Q. Now, did you consider the fact the standing in the business community of these outside directors was essentially not tied up with their career with du Pont?

A. Did I consider that?

Q. Yes, sir.

A. I recognized that.

Q. Now, did you recognize that the standing in the business community of the other directors was essentially tied to their contributions to du Pont as well as the recognition of these contributions by du Pont?

A. I recognized that the other directors are just as good, straightforward citizens as any in or out directors. I don't see any distinction at all.

Q. At the annual stockholders' meeting held the previous year, that is, the annual stockholders' meeting that was held in the calendar year 1971, would it have been possible for Christiana Securities Company to vote its stock against the election of any particular director?

A. I believe so.

Q. Now, assuming that in that 1971 stockholders' election that Christiana had voted its stock against the election of a particular director, and assuming further that

[916]

despite that vote the director had in fact been elected, do you believe that it would have been reasonable to suppose that that particular director would have been re-nominated by the board for election in the following year?

A. I think it is entirely possible.

Q. Your answer, sir, is that it is entirely possible. Would you say that it is entirely probable that he would have been re-nominated?

A. Oh, I can't speculate on a thing like that.

Q. Now, I understand that you suggested to the executive committee that Mr. Shapiro and you would comprise the negotiating committee. Is that correct?

A. That's correct.

Q. Now, did the executive committee in considering your suggestion suggest any other names, or did they simply accept your recommendation as such?

A. My recollection is that there was some consideration given. No other names seriously mentioned. And that they were unanimous in support of this selection.

Q. Then I understand that Mr. Shapiro and you contacted The First Boston Corporation with an idea that it would give financial advice to du Pont in the proposed merger. Is that correct?

A. No, Mr. Shapiro and I did not contact them.

• • •

[920]

• • •

A. No, if the letter is readable I don't compare the —complain about either the style or the size of the print.

Q. Mr. McCoy, I did not ask you whether you complained about the style. I asked you whether you were aware of the fact that the size of the print in your letter was larger than the size of the print in the SEC notice.

A. I was not aware of that.

Q. Considering the letter itself, as well as the enclosure which it contained, do you believe that that was fair and reasonable advice to your stockholders?

A. I do.

Q. Now, Mr. McCoy, referring to a letter from The First Boston Corporation dated July the 6th, 1972, which is I believe du Pont Exhibit No. 4.

At the bottom of the first page of that letter, I believe there is a statement by The First Boston that du Pont had indicated that one of the principal advantages to du Pont in this proposed merger is the fact that in the past a number of business decisions of the du Pont Company had been impeded and delayed by reason of regulatory requirements. Is that correct, sir?

A. We have cited that as one of the problems, yes.

Q. Now, can you put a dollar value on that advantage?

A. No, sir, I cannot.

[921]

Q. Can you tell me whether these business decisions that had been impeded and delayed—were they very serious business decisions?

A. Well, that is a relative thing. At the time they always seemed serious. I wouldn't say that they were of earthshaking importance. They usually had to do with agreements of one kind or another that might be developing with affiliated companies.

Q. Do you believe that that delay cost the du Pont Company any money? Any profits?

A. I hope not.

Q. In looking at your obligation as a director to the stockholders of du Pont, do you believe that you have the same obligation to all stockholders?

A. I have the obligation to do my utmost to manage the du Pont Company to the best long-term interests of all of its stockholders.

Q. If I were to ask you to assume—and I am not asking you to concede that there is a controlling stockholder, but if you were a director of a corporation where there was a controlling stockholder, would you have the same obligation toward that controlling stockholder as toward minority stockholders?

A. In my own conscience I certainly would.

Q. The same obligation toward both?

[922]

A. It would be no different for one than the other.

Q. Now, as you sat at the negotiating table with Mr. Shapiro and the representatives of Christiana, did you

feel that it was your duty to get what you thought was best for the du Pont Company and its stockholders, or did you believe that it was your duty to get what the stockholders themselves would deem best for the company and themselves?

A. I believe it was my duty to negotiate a plan which I would recommend to all stockholders as being in their best long-term interest.

Q. Then I understand you to say that you negotiated for such terms that you thought best for the company and its stockholders?

A. That is right. Within the best obtainable advice.

Q. And I distinguish that from negotiating for such terms as what you believed the stockholders themselves would have deemed best.

A. Well, I think it is up to me to express my opinion, and then they can make their own judgments.

Q. Now, at the negotiation table the Christiana people had their experts and they were pushing their views as to what would be best for their financial interest. Is that correct?

A. I am sure they were.

Q. Now, how did you regard your position? Were you

[923]

primarily representing the non-Christiana stockholders and the company, or were you primarily representing the company and all the stockholders, including Christiana?

A. I had to represent all stockholders.

Q. Well, then, at the negotiation table was there anyone representing the non-Christiana stockholders alone?

A. Mr. Shapiro and I were their representatives.

Q. Looking at the proposed merger on the terms that had been advanced by the applicants, do you say that the greatest gain to the du Pont Company and its stockholders is the dispersal of this block of stock held by the Christiana Company?

A. I believe that is the most important feature of it to the du Pont Company, yes, sir.

Q. Do you believe that this advantage can be measured in terms of dollars?

A. I do not.

Q. Would it be accurate to say that you regard the discount, the increase in earnings of some 6 or 7 cents a share and the increase in the book value of some $1.25 per share as incidental benefits, to use Mr. Shapiro's words I believe fringe benefits?

A. Well, I don't regard those sums as trivial, but I don't believe that those sums determine the advantages to the company. I think they are only part of it,

• • •

[930]

• • •

Q. Certainly in the du Pont situation as it stands there were prima facie possible conflicts of interest, were there not? In dealings between Christiana and du Pont?

A. In a bargain between the two, yes, indeed, I should think there could be. I don't think there is in the long run, because I think that a Christiana stockholder can't help himself if his route to it is to destroy the du Pont Company.

Q. Well, now, isn't it true that as the Christiana influence as a unit abates the influence of management, presumably in the interest of all the company, increases, would you say?

A. I don't understand the question.

Mr. Murtaugh: Would you read the question? Maybe he could understand it. I thought it was fairly clear.

(Question read.)

The Witness: I still—I am sorry, I don't understand it.

By Mr. Murtaugh:

Q. Well, if we can say that Christiana presents a threat to the company because of future abuse, the abatement of that threat will increase the power of the next power center which I presume was management, or maybe that is the

[931]

power center now. But it will abate the threat at least. Isn't that correct?

A. The abatement of—the dispersal of Christiana——

Q. Yes. Will make Christiana less influential.

A. Will remove the potential of problems that might arise because there is a block of stock that can either be mismanaged or dispersed into unfriendly hands.

Q. Intrinsically—inevitably, if you disperse a power center you enhance the power of management in this picture, don't you? Outside of Christiana?

A. Well, I think that so far the management has no reason to be concerned about lack of power. The management has had the power.

Q. But there is less chance of them losing it if there is dispersal of shares. Is that correct?

A. I think they lose it only if they behave in such a way that the stockholders want to remove them or put somebody else in.

Q. Well, I understand that. But the likelihood of Christiana being an influence or an important voting block is dispersed and that leaves the management without that particular threat, either your management or successive managements.

A. Well, I don't—that as it is diminished in size I suppose represents a smaller unit of the vote in one piece.

[932]

But I don't——

Q. You don't think it is seemly to admit that the power of yours and future managements in conducting the company will be less impeded if there is a dispersal?

A. I don't think, for instance, in my case it makes the least bit of difference whether Christiana goes on or doesn't. I am going to be around for a little over a year, maybe, and my interest in the du Pont Company is that they do the very best after I leave as a reflection of whether or not I did my job, let alone my financial interest in it.

Q. Yes, I understand that.

A. And so it——

Q. Let's suppose that—take Mr. Shapiro. He is a relatively young man. He will be here for quite awhile, I presume.

A. Well, I hope so.

Q. Is it to his interest to make management more central in the election of directors?

A. That reaction is so foreign to our situation that I just—I don't even understand it.

Q. You don't?

A. No, sir.

Q. You don't think that—have you ever read in the papers about management taking moves to strengthen its hand, say when a raid comes up?

[933]

A. I read novels, I read all sorts of things that don't really have much application to true life and how business is run.

Q. Well, you read in the papers about counter-moves by management when blocks of stock are moved?

Mr. Gribbon: Objection, Your Honor. It is just getting argumentative.

Mr. Murtaugh: I just wanted to get——

Judge Ullman: I will allow Mr. Murtaugh to proceed to the end of this point if he wants, if there is anything further, sir.

By Mr. Murtaugh:

Q. Well, I think that—I read in the papers constantly, especially in the last two years, of people acquiring blocks of stock, maybe not quite as big as Christiana, and threatening management. Don't you read those sort of instances?

A. I certainly do, yes.

Q. And that could be a possible use of Christiana, couldn't it?

A. I think it could be.

Q. Yes. And the elimination of that is a benefit for the company through the management, isn't that—if the management is a good one. Isn't that correct?

A. If they substituted an inferior management I think

[934]

it would be a very bad thing.

Q. Yes. Thank you.

Now, with respect to your dealings with First Boston Corporation, you said to the best of your knowledge you had never had any previous dealings. Is that correct?

A. Yes, sir.

Q. Now, you said that they came down for sort of a visit to present their views at a sort of social luncheon and got to know each other and that was all that was involved in that first visit.

A. General business conversation.

Q. Now, the next question is, to your knowledge did any of your advisors either within the du Pont or without attempt to indicate to First Boston how they should come out on this problem? And you answered I should certainly think not. That's correct, isn't it?

A. To the best of my knowledge, they certainly did not.

Q. Now, I hand you herewith an instrument which is marked Division's Exhibit 1 in evidence.

If you will look at page 2, you will see that you and Mr. Shapiro signed the covering letter.

A. Yes, sir.

Q. And the following pages contain a good deal of data which you enclosed with your letter which is—I guess comes from Covington and Burling.

* * *

[941]

Q. * * * been a little more objective or attempted to take some of the advantage of a deal which requires two sides and which has great advantage for one and very modest advantages for another? Do you think that is an improper thing to do?

A. I think that we made a very good deal for the du Pont stockholders.

Q. That isn't quite my question.

A. Well, I don't know whether anybody else would have made a different one or would have gone about it in a different way.

Q. You felt you had a responsibility to Christiana as a shareholder as well as to the non-Christiana shareholders of du Pont, didn't you?

A. I did.

Q. Does that disable you somewhat in a bargaining situation, in your opinion?

A. To the extent that I thought it made it absolutely essential to get outside advice, yes.

Q. Now, in getting the outside advice you couldn't eliminate your personal responsibility as president, director, or member of the special committee, could you?

A. No, sir.

Q. You couldn't pass off to them the responsibility that you fundamentally have by virtue of the duties of your position. Is that correct?

[965]

° ° °
° ° °

By Mr. Anderson:

Q. And was it by design that you intentionally did not discuss this matter with Mr. Irenee du Pont, because of a possible conflict between du Pont and Christiana interests?

A. I think it was just a natural thing to do. I don't know if I had any——

Q. Did you have at any time the feeling, Mr. McCoy, that a higher discount might be advisable but that the precedents seemed to go against your pushing for a higher discount from the Christiana Securities Company?

A. No, I did not.

Q. You were generally aware, were you not, Mr. McCoy, as to what the precedents had held in mergers of roughly this type?

A. As this whole thing has developed I have certainly learned more about it. I had no idea before it started other than I think I picked up a note in the paper one time. But I had never made a study of it.

I didn't have any informed opinion.

Q. During the process of the pre-negotiating period did you then become informed that the precedents seemed to say that this type of exchange was usually made at net asset value plus or minus a small discount or premium?

A. That is right.

[966]

Q. If the precedents had said that this type of exchange is usually made at net asset value plus or minus a more substantial premium, would that have been an influence on you to attempt to get a higher discount from Christiana?

A. If that was consistent with the recommendations of the legal financial advisors I would have.

Q. Was it ever brought to your attention, Mr. McCoy, that alternatives might have existed in the SEC precedents whereby the company being merged out of existence might have had a way to realize its net asset value?

A. I don't remember specific instances, no.

Q. I believe you testified yesterday, Mr. McCoy, that no influence was brought to bear by du Pont upon either its investment bankers, First Boston or Morgan Stanley, prior to the June 30th meeting. I think you said there was no influence at any time. My question is, was any influence brought to bear on the investment bankers after they gave their oral reports, which I think was approximately June 30th.

A. Certainly not to my knowledge. I certainly would think not.

Q. Were they given any responses to their oral reports at that meeting which I believe was June 30th?

A. The June 30th meeting, no, no oral responses.

Q. They simply presented their recommendations and

[967]

sat down.

A. That is right.

Mr. Anderson: I have no further questions.

Judge Ullman: Is there any redirect examination?

Mr. Gribbon: One brief question.

RE-DIRECT EXAMINATION.

By Mr. Gribbon:

Q. That document in front of you, Mr. McCoy, I believe has been in evidence as Collins Exhibit 1. And reference has been made to the last paragraph of your letter to the stockholders dated October 4, 1972, and in particular to the first sentence of that paragraph which states that stockholders are not required to take any action with respect to the proposed merger.

Do you recall any discussion about that particular portion of the letter at or about the time it was sent out?

A. I believe that there was a discussion.

Q. What was the reason for that particular language?

A. Well, it was to convey the fact that despite that it was being sent out.

Q. Was there any concern about inquiries from stockholders?

A. None at all.

Q. Did you have any part in preparing the attachment to that letter?

[968]

A. No, sir.

Q. This is precisely as the SEC issued its order, is it not?

A. Well, I would certainly hope so.

Q. You certainly didn't attempt to editorialize or change it in any way.

A. No, sir.

Mr. Gribbon: No further questions, Your Honor.

Judge Ullman: If there is nothing further, you are excused, sir.

The Witness: Thank you.

(Witness excused.)

Judge Ullman: Off the record.

(Discussion off the record.)

Judge Ullman: On the record.

Mr. Broderick, you have some documents that you would like to introduce?

Mr. Broderick: Yes, sir.

The first one which I will ask the Reporter to mark as Christiana Exhibit 4 is headed "Christiana Securities Company, Federal Income Tax Basis to Present Stockholders of Christiana Securities Company Common Stock." As I said, it was with agreement of counsel for du Pont and counsel for Division that this will be moved in evidence and received in evidence.

• • •

[983]

• • •

Mr. Murtaugh: I had thought there was to be a witness here who had the bases of some of these shares. I am looking at page 3 of my application. I would like to get the bases—the answer to Questions E and F specifically. There is some reference in some of the filings to the fact that some of these recently deceased persons have bases which are higher than the current market, in which event, of course, the idea of not to sell because of tax considerations would not be pertinent. I think I should have those to make my own—construct my own table if I can't get it from the people that I mentioned of that category.

Now, to go on to complete the thing, I—

Judge Ullman: Specifically what are you requesting?

Mr. Murtaugh: I am requesting the bases—there is information about bases here. I am requesting specific bases as to everybody that held over 5,000 shares who died in the last ten years, if they have the bases. I am requesting information on them. This is the large group—

[984]

this is the group of large shareholders.

Mr. Broderick: I don't see any relevancy to that, Your Honor, at all.

We have put into this record a tax basis study which shows the current tax basis for a very large number of Christiana shareholders, some 9 million shares out of 11-million-7. And I just don't see the relevance in this proceeding to what the tax basis may have been for a Christiana shareholder who may have died ten years ago or five years ago.

Mr. Murtaugh: Well, if he is holding on to his shares —let's see, now. This is the evidence you are referring to.

Mr. Broderick: That's right.

Judge Ullman: I hope he is not holding on to his shares.

(Laughter.)

Judge Ullman: Please proceed, Mr. Murtaugh. You wanted to continue.

Mr. Murtaugh: Yes. Well, there are some very, very large holders who died since the General Motors decision that was listed on that decree there in 1962. And since the market was generally higher and higher since that time, why, I would like to identify out who these people are.

And one of them is Irénée du Pont, Sr., one of them is Henry

[985]

du Pont who was a very large holder, five percent in my case that I cited. That sort of data which I thought should have been more thoroughly analyzed for the purpose of seeking the question of the liability of shares being put on the market. I would like information about that, and I would consider discovery if I am allowed that privilege, which I understand is a pending question.

So that Your Honor can have the whole thing, I will proceed down the list.

If you will see No. G, I was given the opinions, reports and data of Morgan Stanley and Merrill Lynch, and Your Honor has decided not to introduce—not to let it be introduced because of an objection to the Merrill Lynch material relating to the Christiana-Government suit now pending in Delaware. But the suit itself, which is a pending suit mentioned in the application and specially treated, is a very relevant thing because of the fact that it is pending and mentioned in the application, and secondly because I intend to pursue the point which I have already made that the applicant—I mean Christiana is pursuing inconsistent courses in the different governmental bodies.

Now, H, I wanted material other than that described in G, that is, other than from the financial advisors, furnished to the government in connection with matters described in G.

[986]

Now, the material in the record is rife with statements about the status of that claim in order to discuss how to handle it with reference to this application; and I presume, but I don't know, that there is material there who will

make contentions there inconsistent with Christiana's present contentions, and recognizing that the large amount of shares, two-and-a-half, one-and-three-quarters and two-and-a-half received of outstanding General Motors shares received in 1962, '64 and '65 are entitled to a substantial discount because of their blockage or market impact effect at the time that they were received.

Mr. Gribbon: Your Honor, I respectfully ask that Mr. Murtaugh be admonished to put forth his requests and not put forth his contentions which he has done for the last ten days. He is simply prolonging the record here.

Mr. Murtaugh: I am explaining my hope for a ruling from His Honor. I have a motion for a continuance which I have had pending since the start of this litigation, and this is speaking to that, whether His Honor is going to give me that time in order to take necessary steps to procure this information, unless it will be volunteered.

Then I got I, J, K, L—I asked for copies of all communications in M, on the top of page 7, to Christiana shareholders about the du Pont merger and the restrictions on shares to conform to the security. Now, I have been furnished

[987]

with an agreement which hasn't been finalized yet as to the restrictions on shares. Do you object to my putting this in with the understanding that it isn't the present agreement?

Mr. Gribbon: No, if you will do it promptly and get it in.

Mr. Murtaugh: Yes. I will ask to introduce that. It is the presently developed form but not the finalized form of the registration agreement which will sever Christiana shareholders who are affiliated.

I have asked for all material relating to selling intentions of Christiana shareholders or selling schedules of proposed broker sales or private placements. I assume that the record shows there is no such material. Is that a fair statement?

Mr. Broderick: That's right, because the record reflects that there is no present intention on behalf of Christiana shareholders to sell any of their stock.

Judge Ullman: Mr. Murtaugh has offered as Murtaugh Exhibit 15 a draft dated December 15, 1972, of an agreement between du Pont and Christiana with respect to registration of shares.

Mr. Murtaugh: Registration and other methods of sale of the new shares of related persons.

Judge Ullman: Is there any objection to the receipt of that document?

[988]

Mr. Broderick: No, sir.

Mr. Anderson: Did I understand this not to be an up-to-date document? There is a more recent document than this one?

Mr. Murtaugh: This is dated December 15th and it is the most recent one they have, I understand, but it is not represented to be the final one.

Mr. Anderson: No objection.

Judge Ullman: It is received.

(Murtaugh Exhibit No. 15 was marked for identification and received into evidence.)

Mr. Murtaugh: Finally, I have asked for the mailing address of each director of du Pont and Christiana, and I haven't received that as yet. I want to ask, of course, per-

mission to address interrogatories to them for the purpose of not taking the time of the court to determine on different circumstances here particularly the effect of—I mean the amount of discussion of market impact that each of them were exposed to and the extent to which they were exposed to that issue.

Mr. Gribbon: Your Honor, on behalf of du Pont, we object to the issuance of any interrogatory particularly at this stage of the litigation.

As far as the address of the directors is concerned,

[989]

Mr. Murtaugh has been advised that they can be reached in care of the du Pont Company.

His application for interrogatories is defective under Rule 15, and in addition, anything he would obtain through the interrogatories on the point he made would be entirely cumulative. There has been ample evidence here from the two directors of du Pont particularly responsible for this matter as to the extent of the discussion before both the executive committee and the board of directors. Anything further would simply be a delaying tactic.

Mr. Murtaugh: As far as I—

Mr. Broderick: On behalf of Christiana, I concur.

Judge Ullman: The request is denied. The objection is sustained.

We have some prior requests which Mr. Murtaugh has indicated were not complied with and some which were complied with. I am certainly not in a position to evaluate them, but I will listen to counsel with respect to a response to what Mr. Murtaugh has said he requested and did not receive. And I presume that this is within Mr.

Murtaugh's request for a continuance of this proceeding until the requested information is received.

Mr. Broderick: Well, with respect to Point E of his request, I have indicated earlier that there is now in this record a tax basis study showing the tax basis for

[990]

approximately 9 million shares of Christiana common stock. Mr. Murtaugh, if I understand him corectly, is asking for the tax basis of certain people, large Christiana shareholders who may have died within the last ten years. That information was not furnished to him, and I see absolutely no relevancy of that information to this type of proceeding and the issues that have been raised in this case.

As far as his request for so-called other materials that may have been submitted to the government in the tax refund case, in this particular proceeding Mr. Murtaugh has introduced into evidence the complaint filed by Christiana against the government in the District Court for Delaware, he has the Morgan Stanley reports. In addition to that he has been permitted to put into evidence excerpts from the testimony in the case in Chicago, excerpts from the testimony before various Congressional committees. It seems to me that there is more than enough evidence concerning those points in this record to enable Mr. Murtaugh to make any argument he so desires.

Judge Ullman: I will deny Mr. Murtaugh's request for any further information at this time. And insofar as Mr. Murtaugh has moved for a continuation of the proceeding, unless I hear something entirely new from Mr. Murtaugh at this time, that motion, too, is denied.

• • •

[994]

• • •

Judge Ullman: We have come to a point where I will ask whether an initial decision is desired or is waived, and that is a matter for the parties to the proceeding to determine.

Mr. Broderick: On behalf of Christiana, Your Honor, we are agreeable to waiving an initial decision.

Judge Ullman: Mr. Gribbon?

Mr. Gribbon: Du Pont similarly, solely for the purpose of expediting the ultimate consideration of the matter.

Mr. Osheroff: Yes, the Division agrees, Your Honor.

Judge Ullman: Then an initial decision will be waived in this proceeding.

How much time do the parties want for preparation of their post-hearing documents?

Mr. Broderick: I think, Your Honor, along the line of some discussions yesterday, we would prefer thirty days within which to file briefs on behalf of the applicants. And I would suggest that the Division and participants be given an additional thirty days following our filing, with the right to the applicants to file reply briefs within fifteen days if they so desire.

• • •

APPLICANTS' JOINT EXHIBIT NO. 1A.

MORGAN STANLEY & CO.
140 Broadway
New York, N. Y. 10005

CONFIDENTIAL

July 7, 1972

Messrs. Charles B. McCoy and
Irving S. Shapiro, Directors
E. I. du Pont de Nemours and Company
1007 Market Street
Wilmington, Delaware 19898

Messrs. Edward B. du Pont and
A. Felix du Pont, Directors
Christiana Securities Company
Du Pont Building
Wilmington, Delaware 19898

Dear Sirs:

You have requested our views with respect to the financial basis for the proposed merger of Christiana Securities Company (Christiana) into E. I. du Pont de Nemours and Company (Du Pont) including an appropriate range of ratios of exchange of Du Pont common stock for Christiana common stock and the terms of exchange of Christiana preferred stock. In arriving at such views we have relied upon the statements set forth in your letter of June 6, 1972 and the "List of Documents for Financial Advisor" which have been transmitted to us. We have retained Messrs. Davis Polk & Wardwell and Messrs. Skadden, Arps, Slate, Meagher & Flom as our

Counsel with respect to the legal aspects of various questions which arose during the course of our investigation.

We understand that the principal procedural steps which have been or will be followed if the proposed merger is consummated are as follows:

1. We understand that, from time to time, Du Pont and Christiana have considered the desirability and feasibility of merger, and in a letter dated April 20, 1972 Christiana initiated the present merger discussions with Du Pont.

2. The Boards of Directors of Du Pont and Christiana have each designated a committee, composed of the persons to whom this letter is addressed, to negotiate the merger.

3. The First Boston Corporation, as advisors to Du Pont; Kidder, Peabody & Co. Incorporated as advisors to Christiana; and we, as advisors to Du Pont and Christiana, will render opinions as to the financial basis for the proposed transaction including a range of exchange ratios for Christiana common stock and an exchange ratio for Christiana preferred stock.

4. Subsequently, the respective negotiating committees will meet with a view to determining the definitive terms of merger including a specific exchange ratio of Du Pont common stock for Christiana common stock and a specific exchange ratio of Du Pont common stock for Christiana preferred stock. The Boards of Directors will then vote upon the merger plan.

5. Assuming approval of the two boards, the definitive merger plan will be announced to the public and submitted to the Securities and Exchange Commission for approval under Section 17 of the Investment Company Act of 1940. An application will also be submitted to the Securities and Exchange Commission for de-registration of Christiana under such Act.

6. An application will be submitted to, and it is expected that a ruling will subsequently be obtained from, the Internal Revenue Service that the merger will be considered a tax-free transaction.

7. Following receipt of approval of the proposed transaction by the Securities and Exchange Commission, proxy statements will be mailed to stockholders of both companies. The stockholders of both companies will subsequently meet and vote on the proposed merger subject to securing a favorable Internal Revenue Service ruling.

8. Following a favorable vote, dissenting Christiana preferred stockholders will have the right to seek appraisal of their holdings in court. Payment to any such dissenting holders would be in the form of cash. Under the law of the State of Delaware, common stockholders of Du Pont and Christiana will not be entitled to seek appraisal of their holdings.

9. The merger will be consummated by an exchange of common stock of Du Pont for preferred stock and common stock of Christiana.

10. Following consummation of the merger Du Pont will retire the common and preferred stock of Du Pont held by Christiana.

11. Arrangements will be made so that the $21.0 million Federal tax claim of Christiana (including accrued interest) may be settled at a later date and the sum of $1,000,000 of Christiana's funds set aside for pursuit of the claim. Du Pont common stock equivalent

to the proceeds of the claim, if any, together with any balance of said $1,000,000, subsequently will be distributed to holders of Christiana common stock of record for the merger.

12. After the merger Du Pont intends to dispose of the interests in Wilmington Trust Company and The News-Journal Company presently held by Christiana.

In reaching a conclusion as to an appropriate range of exchange ratios, we have reviewed current market conditions and other factors which we consider pertinent and which will be discussed further in this letter. We are, of course, familiar with Du Pont and Christiana and we have advised both companies on financial matters for a number of years. Such advice has included testimony as to the effects of the divestiture of General Motors Corporation common stock formerly held by Du Pont and by Christiana; recommendations as to appropriate terms for the merger of Delaware Realty and Investment Company (Delaware Realty) and Christiana; and the appropriate terms for exchanges involving Christiana common stock and General Motors common stock and Christiana common stock and Hercules Powder Company common stock. Morgan Stanley & Co. has managed a number of large registered secondary offerings of General Motors common stock sold by Christiana and by stockholders of Christiana and Du Pont, and over the years has executed transactions in the stocks of Christiana and Du Pont, including private placements and secondary offerings of large blocks. We are currently advising Christiana in connection with the Federal tax claim arising out of the General Motors divestiture and from time to time we have advised Du Pont on long-range financing plans. Morgan Stanley & Co. has assisted in raising capital for Du Pont in the past and last

year raised $30,000,000 for Du Pont Overseas Finance N. V. through Morgan & Cie International S. A., our European affiliate.

Exhibit 1 and Exhibit 2 are Memoranda of Fact which describe certain aspects of the operations of and set forth financial data regarding Du Pont and Christiana, respectively. These memoranda have been compiled from the material furnished to us.

Since Christiana is an investment company the assets of which consist almost entirely of marketable securities, we believe it is appropriate to consider its value in terms of the market value of its underlying investments which is the normal way of valuing investment company common stock. In determining the underlying net asset value of Christiana and the market value of Du Pont we have used market prices and, where these are not available, estimated values as of May 31, 1972. Our views set forth the principles which we believe are valid in arriving at appropriate exchange ratios for the proposed merger. Prior to the signing of a merger agreement the terms should be reviewed in order to reflect changes subsequent to May 31 in prices or values or in any other conditions or circumstances which might materially affect the merger.

I. Considerations Regarding a Merger

Advantages and Disadvantages of a Merger

From the point of view of Christiana common stockholders, a merger with Du Pont offers a number of advantages.

1. Assuming the merger were consummated through an exchange for shares of Du Pont common stock having a market value equal to or slightly below the underlying net asset value of Christiana common stock, then Christiana common stockholders

would realize an immediate increase in the market value of their securities. Christiana common stock has consistently sold at a discount from net asset value. As shown in Exhibit 9, such discounts at selected recent dates have been as high as 28%. On April 28, 1972, just prior to the announcement of the proposed merger, the discount was approximately 23%. This discount was equivalent to $44.55 per share, or approximately $521.7 million when applied to all outstanding shares of Christiana common stock.

2. By exchanging shares of Christiana, which shares are traded in limited amounts in the over-the-counter market, for shares of Du Pont, which shares have a broad market on the New York Stock Exchange and more limited markets on regional and other exchanges, Christiana stockholders would significantly increase the marketability of their holdings. Trading in Du Pont averaged about 10,000 shares to 36,000 shares per day on the New York Stock Exchange in the eight weeks prior to the announcement of the proposed merger, while trading in Christiana averaged about 300 to 1,900 shares during the same period as reported by NASDAQ. In view of the disparity in the trading volumes it has been considerably easier to acquire or dispose of a sizable block of Du Pont common stock than a block of Christiana common stock having a similar value.

3. The merger will eliminate the tax burden now being borne indirectly by the stockholders of Christiana by reason of the payment of Federal income tax by Christiana upon dividends received from its holdings, prior to the distribution of such

dividends to the stockholders of Christiana. Income taxes, principally on dividends received, have cost Christiana $4.8 million to $6.0 million per year during the past several years.

4. The merger would result in the elimination of the operating expenses of Christiana which have amounted to $200,000 to $300,000 during each of the past several years.

A possible disadvantage to Christiana of a merger would be the loss of any benefits which it may derive from being the largest holder, with approximately 28.3% of the outstanding common stock, of Du Pont. It is difficult to place an economic value upon such benefits. It should be noted, however, that from time to time, blocks of shares representing control of major corporations have been sold or exchanged at premiums above the quoted market value of the shares. Such a transaction might possibly take place in a merger of Christiana into a company other than Du Pont. In the case of Christiana, however, the size of the block, the fact that it might not, under certain circumstances, represent effective control and the effect of the United States antitrust laws would appear to make such a transaction unlikely.

From the point of view of Du Pont, a merger with Christiana would offer several advantages.

1. Dispersion of the largest single block of Du Pont common stock which is now voted as a unit, among approximately 6,800 Christiana common and 1,500 Christiana preferred stockholders, should effectively increase the relative voice of Du Pont's other stockholders in the Company's affairs.

2. If the exchange ratio should involve a discount from Christiana's underlying net asset value, then the amount of such discount would represent a monetary advantage to Du Pont common stockholders and a partial reduction in the substantial monetary advantages to be realized by Christiana. We recognize that Du Pont common stockholders must approve the merger terms, and the economic advantage must be significant to them. It should be realized that any such monetary benefit to Du Pont would be shared to the extent of 28.3% by Christiana stockholders as a result of their indirect holdings of Du Pont common stock.

3. Du Pont is considered, under the Investment Company Act of 1940, to be an affiliated person of a registered closed-end investment company. As such it is obliged to seek Securities and Exchange Commission exemptions before entering into certain types of transactions. A merger would free Du Pont from the requirement to seek such exemptions.

4. The addition of a number of new stockholders and the transfer of market activity presently centered in Christiana common stock to Du Pont common stock could broaden somewhat the market for Du Pont shares.

A possible disadvantage to Du Pont of a merger would be that the broader market for Du Pont shares and the elimination of the effective discount might encourage certain Christiana stockholders to dispose of their holdings, thereby depressing the market for Du Pont common stock. However, when the potential capital gains tax liabilities of large Christiana stockholders are taken into account, we do not believe that there will be such disposals as would have a material and lasting impact upon Du Pont's common stock price.

Basis for Negotiations

It is our conclusion that the proper basis for negotiations is the underlying net asset value of Christiana and the degree to which it should be preserved in the definitive exchange ratio. An analysis of the relative advantages to be gained by the two parties also leads us to conclude that a merger which preserves entirely Christiana's underlying net asset value would give relatively greater benefit to Christiana than to Du Pont. In addition, we believe some discount from net asset value is required to provide adequate inducement to Du Pont to participate in the proposed merger. Therefore, in our view, the amount of a discount from underlying net asset value should be the principal issue in negotiations.

Other Mergers of Investment Companies Into Their Operating Affiliates

We have studied data regarding a number of mergers of registered closed-end investment companies or holding companies into their operating company affiliates. Such mergers have occurred frequently in the past. Based on our studies we believe several conclusions may be drawn:

1) Generally, the market values of the investment companies (where a market value existed) were at a discount from the underlying net asset values prior to the merger negotiations. Nevertheless, net asset value rather than market value of the investment companies was regarded as the relevant consideration in determining the exchange ratios.

2) In the instances reviewed by us the acquisitions were consummated at exchange ratios which ranged from a premium over net asset value (as defined in the particular case) to a discount of about 1.8% from net asset value of the acquired company. However, many of such acquisitions were consummated at what appears to be net asset value. The merger of Delaware Realty into Christiana in 1961, which is an important precedent, involved a discount of 1.5% from Delaware Realty's net asset value, but, because of the size of Delaware Realty's holdings of Christiana, the effective discount was approximately 1%.

3) In the case of registered investment companies, the Securities and Exchange Commission found, as required pursuant to Section 17 of the Investment Company Act of 1940, that the merger terms were reasonable and fair and did not involve overreaching on the part of any person concerned.

Treatment of Christiana 7% Preferred Stock in a Merger

The Certificate of Incorporation of Christiana allows redemption of the 7% preferred stock in cases of "dissolution or liquidation" at its par value of $100 per share but provides that redemption should occur at $120 per share. We understand that, in the proposed merger of Christiana and Du Pont, Christiana preferred stockholders would be offered the opportunity to receive Du Pont common stock and that, if they dissent from the merger, they would have the right to seek a court appraisal of the value of their shares. Counsel have informed us that, in such a proceeding, it is probable that the court would award them an

amount equal to or approximating the $120 per share equivalent to redemption price. In light of this fact and the fact that such preferred stockholders would become common stockholders and would also suffer a reduction in dividend income, and because we believe such an offer to be fair under current circumstances, we recommend the merger terms include $120 of Du Pont common stock for each Christiana preferred share.

Expense of Merger

We understand the expenses of the proposed merger are estimated to be $1,500,000, and Counsel informs us that, in general, such expenses would not be deductible for U. S. Federal income tax purposes. In the mergers studied, expenses have been treated in a number of ways. In some cases they have been entirely absorbed by one party while in other instances each party has shared in paying the expenses. For purposes of our calculation of Adjusted Net Asset Value set forth below, we have deducted all estimated expenses of the transaction from Christiana's assets.

Value Realized by Du Pont in a Merger

Since we understand that Du Pont intends to dispose of certain Christiana assets, from the point of view of Du Pont, a merger exchange ratio must take into account the values realizable. Consequently, certain adjustments should be made to arrive at an adjusted net asset value of Christiana. For purposes of this analysis we have defined "Adjusted Net Asset Value" as the value of Christiana's holdings of preferred and common stock of Du Pont, based upon the New York Stock Exchange closing price per share, and as the net value of other Christiana assets realizable by Du Pont less all expenses.

We have assumed that following the merger, Du Pont would dispose of its acquired interests in Wilmington Trust Company and The News-Journal Company but would retire the Du Pont common stock and preferred stock acquired. In selling shares of Wilmington Trust Company and The News-Journal Company it appears that Du Pont would incur certain expenses in connection with disposition and, we understand, would be liable for Federal capital gains tax at the corporate rate of 30% on the difference between Christiana's cost bases and the sale prices. We believe such expenses and taxes should be deducted from Christiana's net asset value in arriving at Adjusted Net Asset Value. The valuation established for the shares of the News-Journal Company has been estimated by Mr. Vincent J. Manno in an appraisal. Because such shares do not have a quoted market we believe that this estimate must be regarded as an approximation.

For purposes of the following analysis we have not included any value for Christiana's Federal tax claim because we are unable to determine what value this claim may have. Furthermore, we have reduced Christiana's "Cash and equivalent" by $1,000,000 which sum, we understand, will be set aside to cover costs of litigation or settlement with respect to the tax claim. We understand that Du Pont common stock equivalent in value to the benefits, if any, arising from the tax claim (together with any amounts remaining of the above-mentioned $1,000,000) would be distributed to Christiana stockholders subsequent to the merger when the tax claim is finally settled.

Under the above assumptions Du Pont would realize the following Adjusted Net Asset Value in a tax-free merger as contemplated:

		Value of Assets (1)		
Shares	*Security or Asset*	*Aggregate*	*Per Share of Christiana Common Stock*	*% of Christiana Adjusted Net Asset Value*
13,417,120	Du Pont, Common (170%)	$2,284,264,680		98.992%
16,256	Du Pont, Preferred (69%)	1,123,696		
69,216	Wilmington Trust Company, Common (40%)	2,820,552		
7,460	The News-Journal Company, Common	24,250,000		
	Cash and equivalent	4,238,875		
Asset value before adjustments		$2,316,697,803		100.398%
	Estimated expenses and capital gains tax payable on sale of Wilmington Trust and News-Journal shares (2)	7,656,820		.333
	Estimated expenses of merger	1,500,000		.065
Adjusted Net Asset Value (3)		$2,307,540,983	—	100.00 %
Less: Christiana 7% Preferred Stock at $120 per share		12,780,000		
Adjusted Net Asset Value available to shareholders of Christiana common stock		$2,294,760,983	$195.96	

Notes:

(1) Amounts exclude the value of Christiana's $21.0 million Federal tax claim.

Market prices for Du Pont common and preferred stock represent the close on the NYSE at May 31, 1972. The market price for Wilmington Trust Company represents the closing bid price in the over-the-counter market at May 31, 1972.

The asset value for The News-Journal Company, provided by Mr. Vincent J. Manno, represents the estimated value realizable in an arms-length transaction between a willing buyer and a willing seller net of expenses and includes $1,260,000 of net quick assets as of April 22, 1972.

Cash and equivalent amount is as of May 1, 1972 and excludes $1,000,000 as provision for litigation of Christiana's Federal tax claim.

(2) Amount shown includes $7,570,300 for estimated Federal capital gains tax liability at the corporate rate of 30% on the difference between sales prices and Christiana's cost bases of $903,592 and $846,107, respectively, for holdings of Wilmington Trust Company and The News-Journal Company and a $86,520 ($1.25 per share) reduction for estimated blockage or costs of sale for Wilmington Trust Company common stock. No provision has been made for Delaware taxation of capital gains.

(3) Any discount (determined by the merger negotiations) from the Adjusted Net Asset Value would be deducted from this amount.

Effect of Various Merger Plans on Du Pont and Christiana

A merger at Adjusted Net Asset Value (no discount) or at some discount would have a number of effects (some of which have already been mentioned) upon the earnings per share, dividends per share and market values of Du Pont and Christiana. Exhibits 10 and 11 hereto set forth exchange ratios involving a range of possible discounts from Christiana's Adjusted Net Asset Value and illustrate the effect of such discounts on Du Pont's earnings per share and aggregate dividend payments and upon Christiana's earnings and dividends per share.

II. Alternatives to Christiana Other Than Merger With Du Pont

In contemplating a possible merger with Du Pont, Christiana might also consider certain other alternative courses of action. As we have noted above, we consider Christiana's merger with another party to be unlikely. In contrast to the situation existing in 1961 when Delaware Realty merged with Christiana, present Federal tax laws make an exchange by Christiana stockholders of their shares for underlying assets highly unattractive. Counsel have informed us that, in the event of such an exchange, Christiana would realize taxable capital gains on the appreciation of its assets over their cost basis, and there would possibly be additional capital gains taxes payable by many of the exchanging stockholders themselves. Liquidation of Christiana under Section 333 of the Internal Revenue Code of 1954 has also been examined as an alternative to follow. While such a course of action might possibly realize for Christiana's stockholders their net asset value at only moderate cost to themselves, Counsel are unable to provide assurance that, for a large proportion of Christiana's stockholders, taxation would not result, and thus make this alternative impractical.

III. Conclusion

In your letter to us of June 6, 1972, you requested that we advise you as to a range of ratios of exchange of Du Pont common stock for Christiana common stock which we consider fair and reasonable to both Du Pont and Christiana stockholders. For purposes of our analysis herein we have considered Christiana's Adjusted Net Asset Value and discounts or premiums in relation thereto. Such views may be converted to definitive share exchange ratios by means of a formula which could be incorporated in the merger agreement.

In light of the foregoing analysis of the proposed merger and in view of the relative advantages of a merger to the two parties, we believe Christiana should offer some financial inducement to DuPont to merge. Furthermore, in consideration of the fact that the valuation of The News-Journal Company included in Christiana's Adjusted Net Asset Value is an approximation, we believe some latitude should be given Du Pont in disposing of this asset without loss. In our opinion, therefore, an exchange ratio which recognizes a discount from Christiana's Adjusted Net Asset Value is appropriate under the circumstances. On the other hand, taking account of the substantial body of precedent for mergers of this type to be accomplished at little or no discount from apparent net asset value, we recommend that a discount in the range of 0.5% to 2.5% would be reasonable and fair to both Du Pont and Christiana and the stockholders of each company and would not represent an overreaching by either party. Assuming that the Christiana preferred stock is redeemed at $120 per share, and based upon a market price of 170¾ for Du

Pont common stock as of May 31, 1972, each share of Christiana common stock would receive from 1.14524 shares to 1.12210 shares of Du Pont common stock at such discounts.

Proceeds of a Tax Claim

We also have been asked to recommend a basis for computing the amount of Du Pont common stock to be distributed to Christiana common stockholders of record for purposes of the merger upon receipt by Du Pont of any payment in settlement of the tax claim of $21.0 million. Neither the amount of any recovery nor the time of any such recovery is known at this time. We believe it is desirable that some method of computing the number of Du Pont common shares to be distributed to the Christiana common stockholders should be decided upon which would result in the Christiana common stockholders receiving, promptly after any payment of the tax claim to Du Pont, shares of Du Pont common stock with a market value at the time closely approximating the dollar amount of the refund. In other words, any change in the market price of Du Pont common stock between the record date for the merger and the time of the receipt of any recovery should neither penalize the Christiana common stockholders nor give them a windfall. We also believe that Du Pont should not be placed in the position of distributing, at the time, Du Pont common stock with a market value either greater or less than the amount of any recovery.

It is our opinion that this can best be arranged by means of a formula which would use the average of the daily mean price of Du Pont common stock on the New York Stock Exchange for the 10 business days preceding the date of receipt of the proceeds of the tax claim.

Very truly yours,

APPLICANTS' JOINT EXHIBIT NO. 1B.

Exhibit 2, p. 6.

Among the principal factors that account for this discount relationship are the reduction in dividend income because of Federal income taxes and expenses payable by Christiana, the large unrealized capital gains and the relatively limited market for Christiana common stock in the over-the-counter market. As contrasted with the ordinary diversified investment company which also customarily sells at a discount, the consideration of possible taxes on gains or losses arising from sales of securities would appear to be of less significance in the case of Christiana, since it has not engaged in sales of portfolio holdings.

Holders of Christiana Common Stock

At May 22, 1972 there were 338 Christiana stockholders who owned 1,000 or more shares of Christiana common stock. These stockholders held 11,183,254 shares or 95.5% of the 11,710,103 shares outstanding as of December 31, 1972 and may be classified, generally, as follows:

	Stockholders with 1000 shares or more at May 22, 1972		
	Number of Stockholders	*Aggregate Shares*	*% of Total*
Men	76	1,718,922	15.4%
Women	65	778,809	6.9
Administrators	64	1,180,223	10.6
Brokers and Nominees	109	6,622,155	59.2
Corporations	12	383,392	3.4
Institutions and Foundations	12	499,753	4.5
Total	338	11,183,254	100.0%

Exhibit 9

CHRISTIANA SECURITIES COMPANY

Net Asset Value Per Share and Discount of Market Price
(Based on Mean)(1)

	Net Assets Excluding Investments			*Investments*								
	Net Current Assets (excl. deferred charges)	*Pfd. Stock (redemption value)*	*Subtotal*	*Du Pont Common (last sale) (13,417,120 shares)*	*Du Pont $4.50 Pfd. (last sale) (16,256 shares)*	*Wilmington Trust Company (bid price) (69,216 shares)*	*The News-Journal Company (Net Asset Value)*	*Subtotal*	*Total*	*Net Asset Value per share (on 11,710,103 shares)*	*Mean Market Price on Christiana*	*Discount of Mean Market Price of Christiana from Net Asset Value*
	(000)	(000)	(000)	(000)	(000)	(000)	(000)	(000)	(000)			
December 31, 1967	$ 8,639	$12,780	$(4,141)	$2,126,614	$1,252	$3,738	$5,400	$2,137,004	$2,132,863	$182.14	153⅛	15.7%
June 30, 1968	10,018	12,780	(2,762)	2,121,582	1,264	3,253	5,700	2,131,799	2,129,037	181.81	148	18.6
December 31, 1968	14,957	12,780	2,177	2,213,825	1,268	3,530	5,700	2,224,323	2,226,500	190.13	167	17.4
June 30, 1969	6,740	12,780	(6,040)	1,762,674	1,187	3,461	6,000	1,773,322	1,767,282	150.92	121	19.8
December 31, 1969	3,572	12,780	(9,208)	1,408,798	1,032	2,838	6,000	1,418,668	1,409,460	120.36	96⅝	19.8
June 30, 1970	5,032	12,780	(7,748)	1,527,875	983	2,665	6,500	1,538,023	1,530,275	130.68	103⅛	20.8
December 31, 1970	3,981	12,780	(8,799)	1,789,508	1,150	2,769	6,300	1,799,727	1,790,928	152.94	113	26.1
June 30, 1971	5,487	12,780	(7,293)	1,868,334	1,114	2,630	6,700	1,878,778	1,871,485	159.82	125⅛	21.5
December 31, 1971	4,398	12,780	(8,382)	1,945,482	1,134	2,613	6,800	1,956,029	1,947,647	166.32	126⅛	23.9
January 31, 1972	4,398	12,780	(8,382)	2,057,851	1,122	2,682	6,800	2,068,481	2,060,099	175.92	132⅛	24.7
February 28, 1972	4,398	12,780	(8,382)	2,173,573	1,162	2,769	6,800	2,184,304	2,175,922	185.82	136⅛	25.5
March 31, 1972	4,398	12,780	(8,382)	2,279,233	1,142	2,786	6,800	2,289,961	2,281,579	194.84	142⅛	26.9
Week ending April 7	5,239	12,780	(7,541)	2,347,996	1,105	2,786	6,800	2,358,687	2,351,146	200.78	144	28.3
April 14	5,239	12,780	(7,541)	2,312,776	1,089	2,821	6,800	2,323,486	2,315,945	197.77	144⅛	26.9
21	5,239	12,780	(7,541)	2,292,650	1,085	2,872	6,800	2,303,407	2,295,866	196.06	147⅛	24.8
28	5,239	12,780	(7,541)	2,257,430	1,101	2,855	6,800	2,268,186	2,260,645	193.05	148⅛	23.1
May 1*	5,239	12,780	(7,541)	2,222,211	1,096	2,838	6,800	2,232,945	2,224,404	190.04	154⅛	18.7
May 5	5,239	12,780	(7,541)	2,193,699	1,093	2,838	6,800	2,204,430	2,196,889	187.61	157	16.3
12	5,239	12,780	(7,541)	2,186,991	1,099	2,769	6,800	2,197,659	2,190,118	187.03	153	18.2
19	5,239	12,780	(7,541)	2,240,659	1,097	2,803	6,800	2,251,359	2,243,818	191.61	157	18.1
26	5,239	12,780	(7,541)	2,294,328	1,134	2,821	6,800	2,305,083	2,297,542	196.20	160⅝	18.2
June 2	5,239	12,780	(7,541)	2,309,422	1,124	2,803	6,800	2,320,149	2,312,608	197.49	156⅜	20.8
9	5,239	12,780	(7,541)	2,227,242	1,138	2,803	6,800	2,237,983	2,230,442	190.47	165	13.4
June 15	5,239	12,780	(7,541)	2,262,462	1,154	2,786	6,800	2,273,202	2,265,661	193.48	165	14.7

NOTE:

(1) Sources for the data used in these calculations from 1967 through 1971 were the Annual Reports of Christiana Securities Company. The preferred stock has for all periods been taken at its liquidating value of $120 per share. For the period January 31 through March 31, 1972, values for net current assets were taken from the December, 1971 Annual Report. From April 7, 1972 through June 9, 1972, Net Current Assets have been calculated on the basis of figures contained in the Memorandum dated May 12, 1972 from the Du Pont Treasurer's Department to C. E. Welch, Assistant General Counsel, a copy of which has been supplied to us. The Federal tax claim (re tax on General Motors divestiture) has been for all periods omitted from the calculations. Values for The News-Journal Company during 1972 have been taken from the December, 1971 Annual Report. Values for Wilmington Trust Company during 1972 have been calculated by multiplying the bid price at the date times the number of shares held by Christiana, which has been assumed to be 69,216. 1972 values for Du Pont Common and Preferred have been calculated by multiplying Christiana's holdings in these two securities (assumed to be 13,417,120 and 16,256 respectively) times the closing price on the date.

* Date of announcement of proposed Christiana Securities Company merger with E. I. du Pont de Nemours and Company.

JOINT EXHIBIT NO. 1C.

MORGAN STANLEY & CO.
140 Broadway
New York, N. Y. 10005

July 7, 1972

Messrs. Charles B. McCoy and
Irving S. Shapiro, Directors
E. I. du Pont de Nemours and Company
1007 Market Street
Wilmington, Delaware 19898

Messrs. Edward B. du Pont and
A. Felix du Pont, Directors
Christiana Securities Company
Du Pont Building
Wilmington, Delaware 19898

Dear Sirs:

At your request we are attaching to this letter a copy of our final memorandum setting forth our considerations and recommendations relating to the proposed merger of Christiana Securities Company and E. I. du Pont de Nemours and Company. We understand that you intend to distribute copies of our memorandum to the Boards of Directors of your respective companies.

On June 30, 1972 we submitted for your review and the review of your Counsel preliminary drafts of our memorandum, and we participated in discussing this matter with you and your Counsel on that date.

Following further discussions we have since had with Counsel, we understand that, as an alternative to merger with Du Pont, a liquidation of Christiana under Section

333 of the Internal Revenue Code of 1954 is no longer considered feasible.

We now understand that you have met and agreed to recommend certain terms for the proposed merger which result in a discount of 2.5% from Christiana's Adjusted Net Asset Value. We believe that the discount arrived at by you, which falls within the range set forth in the attached memorandum, is reasonable and fair and not overreaching from the standpoint of Du Pont, Christiana and the shareholders of both companies.

Very truly yours,

/s/ MORGAN STANLEY & Co.

APPLICANTS' JOINT EXHIBIT NO. 2.

CHRISTIANA SECURITIES COMPANY
DU PONT BUILDING
WILMINGTON DELAWARE

April 20, 1972

Mr. C. B. McCoy
Chairman and President
E. I. du Pont de Nemours & Company
1007 Market Street
Wilmington, Delaware 19898

Dear Mr. McCoy:

As you know, Christiana Securities Company owns approximately 28% of the outstanding common stock of the Du Pont Company. In recent years this block of stock has represented about 99% of the total assets of Christiana.

We have believed over the years that Christiana has served a desirable and useful purpose in that it has tended to contribute to the continuity of sound and able management of the Du Pont Company. But there are certain disadvantages associated with the holding of such a large block of Du Pont stock in this form. For example, the market price for Christiana common stock consistently is lower than the value of the underlying net assets, Du Pont dividends flowing to Christiana are subject to Federal income tax at an effective rate of 7.2%, and there are certain conditions that limit to some extent the marketability of Christiana common stock. These disadvantages may now outweigh the benefits derived from the holding of a large block of Du Pont stock by Christiana, and a merger of Christiana with Du Pont could be desirable. Such a merger could also have advantages for Du Pont. I believe

a merger might be practicable on terms that would be favorable to both Christiana and Du Pont and the stockholders of both companies.

Accordingly, I plan to call a meeting of the Board of Directors of Christiana for April 28, 1972 to discuss possibilities of a merger of Christiana into Du Pont. If the Christiana Board feels that such a merger might be desirable, I anticipate that a special committee of the Board will be appointed to develop possible terms for a merger.

I would appreciate your giving consideration to this matter from the standpoint of the interests of the Du Pont Company. If you feel that such a merger could be of possible interest to Du Pont, you might wish to appoint a special committee of the Du Pont Board to discuss the matter with a special committee of the Christiana Board appointed for such purpose.

Very truly yours,

/s/ IRÉNÉE DU PONT, JR.
Irénée du Pont, Jr.
President

APPLICANTS' JOINT EXHIBIT NO. 3.

E. I. DU PONT DE NEMOURS AND COMPANY
CHRISTIANA SECURITIES COMPANY

June 6, 1972

Morgan Stanley & Co.
140 Broadway
New York, New York 10005

Gentlemen:

The Boards of Directors of E. I. du Pont de Nemours and Company and Christiana Securities Company have each designated a Committee to negotiate a proposed merger of Christiana into Du Pont. We request that Morgan Stanley & Co. advise the Committees of each Board with regard to the proposed transaction.

You are requested to render an opinion and accompanying report addressed to both Committees, based upon a financial analysis and evaluation and taking into consideration all material factors you believe to be relevant to assist the Committees in their negotiations. Your report should set forth a range of ratios of exchange of Christiana Common Stock for Du Pont Common Stock and recommendations as to terms of exchange of Christiana Preferred Stock which you consider fair and reasonable to both Du Pont and Christiana and the shareholders of each such company. The merger will be subject to the approval of the Securities and Exchange Commission under the provisions of Section 17 of the Investment Company Act of 1940, which provides that as a prerequisite to approval, the Commission must determine, among other things, that the terms of the proposed transaction are reasonable and fair and do not involve overreaching on the part of any person concerned.

We understand that you will undertake the study necessary to prepare such report and formulate such opinion immediately with a view to furnishing such material by June 20, 1972 if practicable. If you are willing to accept this assignment, please sign the two copies hereof and return one of the same to each of the companies.

Very truly yours,

SPECIAL COMMITTEES OF THE BOARD OF DIRECTORS OF:

E. I. DU PONT DE NEMOURS AND COMPANY

/s/ C. B. McCOY
C. B. McCoy

/s/ I. S. SHAPIRO
I. S. Shapiro

CHRISTIANA SECURITIES COMPANY

/s/ EDWARD B. DU PONT
Edward B. du Pont

/s/ A. FELIX DU PONT, JR.
A. Felix du Pont, Jr.

The foregoing assignment
is hereby accepted.

MORGAN STANLEY & CO.

APPLICANTS' JOINT EXHIBIT NO. 4.

[CONFORMED COPY]

AGREEMENT AND PLAN OF REORGANIZATION

between

E. I. DU PONT DE NEMOURS AND COMPANY

and

CHRISTIANA SECURITIES COMPANY

AGREEMENT AND PLAN OF REORGANIZATION dated this 20th day of December, 1972 (hereinafter the "Agreement") by and between E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation (hereinafter sometimes referred to as "Du Pont" or the "Surviving Corporation"), and CHRISTIANA SECURITIES COMPANY, a Delaware corporation (hereinafter sometimes referred to as "Christiana").

WITNESSETH:

WHEREAS, Du Pont is a corporation duly organized and existing under the laws of the State of Delaware, having been incorporated on September 4, 1915, under the General Corporation Law of Delaware, and has an authorized capital stock of 64,000,000 shares of which 60,000,000 are Common Stock and 4,000,000 are Preferred Stock;

WHEREAS, Christiana is a corporation duly organized and existing under the laws of the State of Delaware, having been incorporated on March 1, 1915, under the General Corporation Law of Delaware, and has an authorized capital stock of 13,706,500 shares of which 13,600,000 are Common Stock and 106,500 are Preferred Stock;

WHEREAS, the respective Boards of Directors of Du Pont and Christiana have adopted resolutions approving this Agreement providing, as a part hereof, for the merger of Christiana into Du Pont as contemplated hereby (hereinafter the "Merger"), such Merger to be upon the terms and conditions set forth in the Agreement of Merger attached hereto as Exhibit A, and such respective Boards of Directors will direct, subject to the conditions specified herein, that pursuant to the provisions of Section 251 of the General Corporation Law of Delaware, the Agreement of Merger be submitted to the stockholders of Du Pont and of Christiana at meetings separately called and held for the purpose of considering and voting upon the adoption or rejection thereof; and

WHEREAS, this Agreement is intended to constitute a plan of reorganization pursuant to Section 368 of the Internal Revenue Code of 1954.

NOW, THEREFORE, in consideration of the premises and the mutual agreements, covenants and provisions herein contained, the parties hereto have agreed and do hereby agree to merge subject to the conditions hereinafter set forth, as follows:

1. AGREEMENT TO MERGE.

The parties hereby agree that, subject to the terms and conditions of this Agreement, each of them shall duly execute and deliver to the other party hereto an Agreement of Merger substantially in the form attached hereto as Exhibit A and shall take appropriate action to cause such Agreement of Merger to become effective.

2. CLOSING.

The closing of the transaction provided for in Article 1 shall take place at the offices of Du Pont, Du Pont Building,

Wilmington, Delaware, at 10:00 a.m. on December 31, 1972, or as soon thereafter as possible; provided, however, that if the Merger is not consummated on or before June 30, 1973, this Agreement, unless mutually extended in writing by the parties hereto, shall terminate without liability of any kind on the part of either party. Promptly following the closing, Christiana and Du Pont shall each cause to be filed the Agreement of Merger in final form, properly executed and acknowledged, in accordance with the provisions of the General Corporation Law of Delaware. The date on which the Agreement of Merger becomes effective pursuant to the provisions of said law is hereinafter referred to as the "Effective Date".

3. REPRESENTATIONS AND WARRANTIES OF CHRISTIANA.

Christiana hereby represents and warrants as follows:

3.1 *Organization.* Christiana is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and is not required to be qualified to do business in any jurisdiction; and the copies of Christiana's Certificate of Incorporation, as amended, certified by the Secretary of State of Delaware, and of Christiana's By-Laws, certified by Christiana's Secretary, which have been delivered to Du Pont, are complete and correct as of the date of this Agreement.

3.2 *Capitalization.* Christiana's authorized capital stock consists of 106,500 shares of Seven Per Cent. Cumulative Non-voting Preferred Stock of the par value of $100 per share, of which 106,500 shares are validly issued and outstanding, and 13,600,000 shares of Common Stock of the par value of $1.25 per share, of which 11,710,103 shares are validly issued and outstanding; Christiana is not a party to any options, calls or commitments of any character relating to the purchase or sale of Christiana's authorized or issued stock.

3.3 *Authority.* The execution, delivery and performance of this Agreement by Christiana, including without limitation the merger of Christiana into Du Pont on the terms as set forth herein, have been duly and effectively authorized by the Board of Directors of Christiana, subject to adoption of the Agreement of Merger by the stockholders of Christiana, and subject to such other conditions as are provided herein.

3.4 *Financial Statements.* Christiana has delivered Du Pont copies of the following financial statements, all of which have been prepared in accordance with generally accepted accounting principles consistently followed throughout the periods indicated:

(i) balance sheet of Christiana as at December 31, 1971, and statements of income and undistributed net income for the years ended December 31, 1971, and 1970, in each case including notes thereto, certified by Haskins & Sells, certified public accountants; and

(ii) balance sheet of Christiana as at June 30, 1972, and statement of income and undistributed net income for the six-month period ended June 30, 1972, including notes thereto, certified by Haskins & Sells, certified public accountants.

Each of the aforesaid balance sheets fairly presents as of its date the financial condition and assets and liabilities of Christiana, and each of the aforesaid statements of income and undistributed net income fairly presents the results of operations of Christiana for the period indicated.

3.5 *Absence of Undisclosed Liabilities.* Except as otherwise contemplated by this Agreement and except as and to the extent reflected or reserved against in Christiana's balance sheet as at June 30, 1972, as of the date thereof Christiana had no material liabilities or obligations (whether accrued, absolute, contingent or otherwise) of a nature customarily reflected in a corporate balance sheet prepared in accordance with generally accepted accounting principles.

3.6 *Absence of Certain Changes or Events.* Since June 30, 1972, there has not been:

(i) any change in Christiana's financial condition, assets, liabilities or business, other than changes in the ordinary course of business, none of which has been material and adverse;

(ii) any declaration, setting-aside or payment of any dividend or other distribution in respect of Christiana's capital stock, except for quarterly cash dividends paid in accordance with its customary practices; and

(iii) any other event or condition of any character which has materially and adversely affected Christiana's assets or business.

3.7 *Tax Matters.* The provision made for taxes on Christiana's balance sheet as at June 30, 1972, is sufficient for the payment of all accrued and unpaid Federal, state and local taxes of Christiana, whether or not disputed, for the six-month period ended on June 30, 1972, and for all years prior thereto. Christiana's Federal income tax returns have been audited by the Internal Revenue Service for all open years to and including the year ended December 31, 1970, except for 1968 and 1969. All Federal, state

and local taxes due and payable by Christiana on or before the date of this Agreement have been paid. The Internal Revenue Service has proposed a deficiency in Federal income taxes for 1967 of approximately $89,000 which Christiana is contesting.

3.8 *Absence of Liens and Encumbrances.* Christiana has good and marketable title to all of its assets (including those reflected in Christiana's balance sheet as at June 30, 1972, except as since sold or otherwise disposed of in the ordinary course of business) free and clear of all liens, pledges or other encumbrances.

3.9 *Litigation.* Except for (i) *Christiana Securities Co. v. United States,* C. A. No. 3831 (D. Del.), and (ii) any litigation affecting Du Pont, there is no litigation, proceeding or governmental investigation pending, or, so far as known to Christiana, threatened against or relating to Christiana or its assets or business nor is there any basis known to Christiana for any such action.

3.10 *Governmental Authorities.* Christiana is duly registered as a nondiversified management investment company under the Investment Company Act of 1940, and is in full compliance with, and not in default of the performance of any action required under such Act, the Rules and Regulations of the Securities and Exchange Commission (the "Commission") adopted thereunder or any order of the Commission entered thereunder. Christiana is not a bank holding company as defined in the Bank Holding Company Act of 1956.

3.11 *Securities.* Christiana had valid and marketable title, free of any liens and encumbrances, to the following securities as of June 30, 1972:

13,417,120 shares	Du Pont Common Stock
16,256 shares	Du Pont $4.50 Series Cumulative Preferred Stock
69,216 shares	Wilmington Trust Company Common Stock
7,460 shares	The News-Journal Company Common Stock

3.12 *The News-Journal Company.* Christiana owns all the outstanding equity securities of The News-Journal Company and such securities are validly issued, fully paid and nonassessable; such company is duly organized and validly existing under the laws of the State of Delaware and is duly qualified to do business in all states in which the nature of its business as now conducted requires it to be qualified; the balance sheet of such company as at December 31, 1971, and the statements of income for the years ended December 31, 1970, and 1971, certified by Price Waterhouse & Co., previously delivered to Du Pont, have been prepared in accordance with generally accepted accounting principles consistently followed throughout the periods indicated; such balance sheet fairly presents as of its date the financial condition and assets and liabilities of such company; such statements of income fairly present the results of operations of such company for the periods indicated; and since December 31, 1971, except for earnings trends reflected in unaudited interim financial statements delivered to Du Pont, there has not been any change in such company's financial condition, assets, liabilities, or business other than changes in the ordinary course of business, none of which has been material and adverse, or any other event or condition which has materially and adversely affected such company's assets or business.

4. Representations and Warranties of Du Pont.

Du Pont hereby represents and warrants as follows:

4.1 *Organization.* Du Pont is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, has the corporate power to carry on its business as it is now being conducted, and is qualified to do business in each jurisdiction other than Delaware where it owns any principal manufacturing plants or in which the nature of its business requires it to be so qualified. The copies of Du Pont's Certificate of Incorporation, as amended, certified by the Secretary of State of Delaware, and of Du Pont's By-Laws, certified by Du Pont's Secretary, which have been delivered to Christiana, are complete and correct as of the date of this Agreement. Du Pont has valid title to all its principal manufacturing plants and facilities and to the stock it holds of each company which, under the Rules and Regulations of the Commission promulgated pursuant to the Securities Act of 1933, constitutes a significant subsidiary (the "Significant Subsidiaries").

4.2 *Capitalization.* Du Pont's authorized capital stock consists of 4,000,000 shares of Preferred Stock without par value, of which on June 30, 1972, there were issued and outstanding 1,688,850 shares of the $4.50 Series and 700,000 shares of the $3.50 Series, and 60,000,000 shares of Common Stock of the par value of $5.00 per share, of which on June 30, 1972, there were issued and outstanding or held in treasury 47,566,594 shares.

4.3 *Authority.* The execution, delivery and performance of this Agreement, including without limitation the merger of Christiana into Du Pont, on the terms as set forth herein, have been duly and effectively authorized by the Board of Directors of Du Pont, subject to adoption of

the Agreement of Merger by the stockholders of Du Pont and subject to such other conditions as are provided herein.

4.4 *Financial Statements.* Du Pont has delivered to Christiana copies of the following financial statements, all of which have been prepared in accordance with generally accepted accounting principles consistently followed throughout the periods indicated:

(i) consolidated balance sheet of Du Pont as at December 31, 1971, and statements of income and stockholders' equity for the years ended December 31, 1971, and 1970, in each case including notes thereto, certified by Price Waterhouse & Co., certified public accountants; and

(ii) consolidated balance sheet of Du Pont as at June 30, 1972, and statement of income for the six-month period ended June 30, 1972.

Each of the aforesaid consolidated balance sheets fairly presents as of its date the financial condition and assets and liabilities of Du Pont and each of the aforesaid statements of income and stockholders' equity fairly presents the results of operations of Du Pont for the period indicated.

4.5 *Absence of Undisclosed Liabilities.* Except as otherwise contemplated by this Agreement and except as and to the extent reflected or reserved against in the consolidated balance sheet of Du Pont as at June 30, 1972, as of the date thereof Du Pont had no material liabilities or obligations (whether accrued, absolute, contingent or otherwise) of a nature customarily reflected in a corporate balance sheet prepared in accordance with generally accepted accounting principles.

4.6 *Absence of Certain Changes or Events.* Since June 30, 1972, there has not been:

(i) any change in financial condition, assets, liabilities or business of Du Pont and the Significant Subsidiaries, taken as a whole, other than changes in the ordinary course of business, none of which has been material and adverse;

(ii) any declaration, setting-aside or payment of any dividend or other distribution in respect of Du Pont's capital stock, except for quarterly cash dividends paid in accordance with its customary practices; and

(iii) any other event or condition of any character which has materially and adversely affected the business or assets of Du Pont.

4.7 *Tax Matters.* The provision made for taxes on Du Pont's consolidated balance sheet as at June 30, 1972, is sufficient for the payment of all accrued and unpaid Federal, state and local taxes of Du Pont, whether or not disputed, for the six-month period ended on June 30, 1972, and for all years prior thereto. Du Pont's Federal income tax returns have been audited by the Internal Revenue Service for all open years to and including the year ended December 31, 1965. All Federal, state and local taxes due and payable by Du Pont on or before the date of this Agreement have been paid.

4.8 *Litigation.* Du Pont has delivered to Christiana a list of significant suits or proceedings pending against Du Pont. There is no other litigation, proceeding or governmental investigation pending, or, so far as known to Du

Pont, threatened against or relating to Du Pont or its Significant Subsidiaries, or its or their assets or business, the effect of which would be material and adverse to the assets or business of Du Pont and the Significant Subsidiaries taken as a whole, nor is there any basis known to Du Pont for any such action.

4.9 *Disposition of Certain Assets.* It is Du Pont's present intention, following the Effective Date, to dispose of the 69,216 shares of Wilmington Trust common stock and the interest in The News-Journal Company it will acquire pursuant to the Merger, it being recognized by the parties hereto that Du Pont intends to exercise its business judgment as to the timing, manner, terms and other conditions of disposition.

5. Access and Information.

Christiana and Du Pont hereby agree that each will give to the other and to the other's counsel, accountants and other representatives, full access, during normal business hours throughout the period prior to the date of closing, to all of its properties, books, contracts, commitments and records relevant to its performance under this Agreement, and that each will furnish the other during such period with all such information concerning its affairs as such other party may reasonably request.

6. Covenants of Christiana.

Christiana hereby covenants and agrees that prior to the Effective Date, it will not, without the prior written consent of Du Pont, except as otherwise specifically provided in this Agreement:

(a) amend its Certificate of Incorporation or By-Laws;

(b) engage in any activity or transaction or incur any obligation (by contract or otherwise) except in the ordinary course of business;

(c) sell or otherwise dispose of any of the securities listed in paragraph 3.11 of Article 3;

(d) issue rights or options to purchase or subscribe to, or subdivide, any shares of its capital stock;

(e) issue or sell any shares of its capital stock; or

(f) declare any dividends on, or make any distributions in respect of, any shares of its capital stock, or purchase or acquire for value any shares of its capital stock, except that Christiana may declare and pay quarterly cash dividends on its capital stock, the amounts and dates of such declarations and payments to be determined in accordance with its customary dividend policies and practices.

7. Covenants of Du Pont.

Du Pont hereby covenants and agrees as follows:

7.1 *Certificate of Incorporation.* Prior to the Effective Date, it will not, except as otherwise consented to in writing by Christiana, adopt any amendment (other than the proposed amendment set forth in the Agreement of Merger) to its Certificate of Incorporation which would affect in any manner the preferences, rights or powers of Du Pont Common Stock, or the number of shares thereof which are authorized or outstanding.

7.2 *Authorized Shares.* It will keep continuously available such number of authorized and unissued shares

of Common Stock as is necessary to make the Contingent Share Distribution referred to in Article Fifth of the Agreement of Merger.

7.3 *Exchange Listing.* It will use its best efforts to list on the New York Stock Exchange effective upon notice of issuance the shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of Merger.

8. COVENANTS OF CHRISTIANA AND DU PONT.

8.1 *Applications.* Du Pont and Christiana have jointly applied to the Commission for an order or orders granting all necessary approval and authority for the Merger and have jointly applied to the Internal Revenue Service for certain rulings with respect to the tax consequences of the Merger, and shall cooperate to the end that the requested order and rulings shall issue as promptly as possible.

8.2 *Stockholder Action.* As soon as possible after receiving an order from the Commission as contemplated in paragraph 8.1 of this Article, Christiana shall submit the Agreement of Merger to its stockholders for the purpose of considering and acting upon the adoption thereof and Du Pont shall submit the Agreement of Merger (including as a part thereof the amendment to its Certificate of Incorporation to increase its authorized Common Stock to 65,000,000 shares) to its stockholders for the purpose of considering and acting upon the adoption thereof. Christiana and Du Pont will each supply the other with material for inclusion in their respective proxy statements describing their respective businesses which shall meet the requirements of the Investment Company Act of 1940 and the Securities Exchange Act of 1934 and the Rules and Regulations of the Commission thereunder as to proxy statements.

9. CONDITIONS PRECEDENT TO OBLIGATIONS OF CHRISTIANA.

Each and every obligation of Christiana to be performed on or prior to the date of closing shall be subject to the satisfaction, on or before the date of closing, of the following conditions:

9.1 *Representations and Warranties.* Except for changes therein permitted or required under this Agreement, the representations and warranties of Du Pont set forth in this Agreement shall be true in all material respects as of the date hereof and as of the date of closing; Du Pont shall have performed and complied with all agreements and conditions required by this Agreement to be performed or complied with by it prior to or on the date of closing; and Christiana shall have been furnished with a certificate of appropriate officers of Du Pont, dated the date of the closing, certifying in such detail as Christiana may reasonably request to the fulfillment of the foregoing conditions.

9.2 *Internal Revenue Service Rulings.* The Internal Revenue Service shall have issued a ruling or rulings satisfactory in form and substance to Christiana and to Dechert Price & Rhoads substantially to the following effect:

(a) No gain or loss will be recognized to Christiana upon the transfer of its assets to and the assumption of its liabilities by Du Pont pursuant to this Agreement and the Agreement of Merger, and no gain or loss will be recognized to Christiana upon the distribution by Christiana of Du Pont Common Stock and cash to the preferred shareholders of Christiana in exchange for their Christiana Preferred Stock or upon the distribution by Christiana of Du Pont Common Stock to the common stockholders of Christiana in exchange for their Christiana Common Stock;

(b) No gain or loss will be recognized to Du Pont upon the issuance of its Common Stock pursuant to this Agreement and the Agreement of Merger;

(c) No gain or loss will be recognized to the holders of Christiana Preferred Stock on the conversion of such stock in accordance with this Agreement and the Agreement of Merger, except that such ruling shall be deemed to be satisfactory notwithstanding that it states that the cash received by such holders will be taxable to them as capital gain or ordinary income;

(d) No gain or loss will be recognized to the holders of Christiana Common Stock upon the conversion of such stock into Du Pont Common Stock, including stock, if any, received in the Contingent Share Distribution (as that term is defined in the Agreement of Merger) but excluding any such stock treated as interest;

(e) The basis of the Du Pont Common Stock (except for any portion of the Contingent Share Distribution treated as interest) received by the holders of the Christiana Preferred Stock and of the Christiana Common Stock will be the same as the basis of the Christiana Preferred Stock or Common Stock converted thereinto, except that such ruling shall be deemed to be satisfactory notwithstanding that it states or indicates that adjustments are to be made (1) for the cash received by the holders of the Christiana Preferred Stock, (2) for the stockholder's interest in, and for the receipt of, the Contingent Share Distribution in the case of the holders of the Christiana Common Stock, and (3) for the gain, if any, recognized to the holders of the Christiana Preferred Stock; and

(f) The holding period of the Du Pont Common Stock (except for any portion of the Contingent Share Distribution treated as interest) received by the stockholders of Christiana will include the period during which the stock converted thereinto was held, provided that the stock so converted was a capital asset in the hands of the respective stockholder.

9.3 *Commission Order.* The Commission shall have issued an order pursuant to the Investment Company Act of 1940, satisfactory in form and substance to Christiana and to Dechert Price & Rhoads, exempting the Merger from the provisions of Section 17 of the Act.

9.4 *Exchange Listing.* The shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of Merger shall have been authorized for listing on the New York Stock Exchange upon official notice of issuance.

9.5 *Opinions of Counsel.* Christiana shall have been furnished with an opinion, dated as of the date of closing, of Charles E. Welch, Esq., Assistant General Counsel to Du Pont, as to the matters specified in (i), (ii), (iii) and (vi) below, of Covington & Burling as to the matters specified in (ii), (iii), (iv), (v) and (vi) below, and of Dechert Price & Rhoads as to such of the matters specified in (ii), (iii), (iv), (v) and (vi) below as Christiana may have requested (each of which counsel may, as to matters of Delaware law, rely upon the opinion of Mr. Welch):

(i) Du Pont is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, and has corporate power to carry on its business as it is then being conducted;

(ii) the execution, delivery and performance of this Agreement and the Agreement of Merger by Du Pont have been duly authorized and approved by all requisite action of the Board of Directors and stockholders of Du Pont, this Agreement and the Agreement of Merger have been duly executed and delivered by Du Pont and this Agreement constitutes and the Agreement of Merger when it becomes effective will constitute a valid and binding obligation of Du Pont in accordance with their terms;

(iii) all shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of Merger to holders of capital stock of Christiana will upon such issuance in accordance with this Agreement and the Agreement of Merger be validly issued, fully paid and nonassessable;

(iv) the shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of Merger are not required to be registered under the Securities Act of 1933 or the Rules and Regulations of the Commission as in effect on the date of the opinion, or, if such registration is required, such registration has become effective;

(v) all necessary orders and approvals of the Commission under the Investment Company Act of 1940 have been received; and

(vi) no suit, action or other proceeding is to the best of the knowledge of such counsel pending or threatened before any court or administrative agency which, in such counsel's opinion, would result in a judgment or order preventing consummation of the Merger.

9.6 *Disposition of Shares.* Those stockholders of Christiana who will be restricted by the Securities Act of 1933 with respect to disposition of shares of Du Pont Common Stock received as a result of the Merger shall have received offers from Du Pont to enter into agreements, in a form satisfactory to Christiana, regarding obligations of the parties to such agreements in connection with any dispositions of such shares of Du Pont Common Stock by such stockholders.

10. Conditions Precedent to Obligations of Du Pont.

Each and every obligation of Du Pont to be performed on or prior to the date of closing shall be subject to the satisfaction, on or before the date of closing, of the following conditions:

10.1 *Representations and Warranties.* Except for changes therein permitted or required under this Agreement, the representations and warranties of Christiana set forth in this Agreement shall be true in all material respects as of the date hereof and as of the date of closing; Christiana shall have performed and complied with all agreements and conditions required by this Agreement to be performed or complied with by it prior to or at the date of closing; and Du Pont shall have been furnished with a certificate of appropriate officers of Christiana, dated the date of closing, certifying in such detail as Du Pont may reasonably request to the fulfillment of the foregoing conditions.

10.2 *News-Journal Certificate.* Du Pont shall have been furnished with a certificate of appropriate officers of The News-Journal Company dated the date of closing to the effect that since December 31, 1971, except for earnings trends reflected in unaudited interim financial state-

ments delivered to Du Pont, there has been no material and adverse change in the business and assets and in the condition and operations, financial or otherwise, of such company.

10.3 *Internal Revenue Service Rulings.* The Internal Revenue Service shall have issued a ruling or rulings satisfactory in form and substance to Du Pont and to Covington & Burling substantially to the following effect:

(a) No gain or loss will be recognized to Christiana upon the transfer of its assets to and the assumption of its liabilities by Du Pont pursuant to this Agreement and the Agreement of Merger, and no gain or loss will be recognized to Christiana upon the distribution by Christiana of Du Pont Common Stock and cash to the preferred shareholders of Christiana in exchange for their Christiana Preferred Stock or upon the distribution by Christiana of Du Pont Common Stock to the common stockholders of Christiana in exchange for their Christiana Common Stock;

(b) No gain or loss will be recognized to Du Pont upon the issuance of its Common Stock pursuant to this Agreement and the Agreement of Merger;

(c) The basis to Du Pont of the assets acquired from Christiana pursuant to this Agreement and the Agreement of Merger will be the same as the basis of such assets to Christiana immediately before the Effective Date of the Merger; and

(d) The holding period to Du Pont of the assets acquired from Christiana pursuant to this Agreement and the Agreement of Merger will include the holding period of such assets to Christiana.

10.4 *Commission Order.* The Commission shall have issued an order pursuant to the provisions of the Investment Company Act of 1940 satisfactory in form and substance to Du Pont and to Covington & Burling, exempting the Merger from the provisions of Section 17 of the Act.

10.5 *Disposition of Shares.* Those stockholders of Christiana who will be restricted by the Securities Act of 1933 with respect to disposition of shares of Du Pont Common Stock received as a result of the Merger shall have entered into agreements with Du Pont, in a form satisfactory to Du Pont, regarding obligations of the parties to such agreements in connection with any dispositions of such shares of Du Pont Common Stock by such stockholders.

10.6 *Opinions of Counsel.* (a) Du Pont shall have been furnished with an opinion, dated as of the date of closing, of Covington & Burling as to the matters specified in (ii), (iii), (iv) and (v) below and of Dechert Price & Rhoads as to each of the matters set forth below (each of whom, as to matters of Delaware law, may rely on the opinion of Morris, Nichols, Arsht & Tunnell) to the effect that:

(i) Christiana is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, and has corporate power to carry on its business as it is then being conducted;

(ii) the execution, delivery and performance of this Agreement and the Agreement of Merger by Christiana have been duly authorized and approved by all requisite action of the Board of Directors and stockholders of Christiana, this Agreement and the Agreement of Merger have been duly executed and delivered by Christiana and this Agreement constitutes and the Agreement of Merger when it becomes effective will constitute a valid and binding obligation of Christiana in accordance with their terms;

(iii) the shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of Merger are not required to be registered under the Securities Act of 1933 or the Rules and Regulations of the Commission as in effect on the date of the opinion, or, if such registration is required, such registration has become effective;

(iv) all necessary orders and approvals of the Commission under the Investment Company Act of 1940 have been received; and

(v) no suit, action or other proceeding is to the best of the knowledge of such counsel pending or threatened before any court or administrative agency which, in such counsel's opinion, would result in a judgment or order preventing consummation of the Merger.

(b) Du Pont shall have been furnished with an opinion, dated as of the date of closing, of Richards, Layton & Finger, counsel to The News-Journal Company, to the effect that:

(i) The News-Journal Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, and has corporate power to carry on its business as it is then being conducted; and

(ii) all shares of The News-Journal Company capital stock outstanding as of the date of such opinion are validly issued, fully paid and nonassessable.

11. TERMINATION OF WARRANTIES AND REPRESENTATIONS.

All statements contained in any certificate, instrument or document delivered by or on behalf of the parties pursuant to this Agreement shall be deemed representations and warranties by the respective parties hereunder. None of the representations, warranties, agreements and covenants hereunder shall survive the Effective Date except for the representation of Du Pont made pursuant to paragraph 4.9 of Article 4 hereof and the covenant of Du Pont made pursuant to paragraph 7.2 of Article 7 hereof.

12. WAIVER.

Either party hereto may at its option waive in writing any and all covenants and conditions herein contained to which its obligations hereunder are subject.

13. TERMINATION.

Anything herein to the contrary notwithstanding, this Agreement and the Agreement of Merger may be terminated and the Merger may be abandoned at any time prior to the date of closing:

(a) by mutual agreement evidenced by resolutions of the Boards of Directors of the parties hereto; or

(b) by Du Pont in the event that (i) the Agreement of Merger shall not be approved by its stockholders by the requisite vote, or (ii) any suit, action or other proceeding shall have been instituted or is threatened before any court or administrative agency which, in the opinion of Covington & Burling, would result in an order requiring the divestment of any assets acquired by Du Pont as a result of the Merger, other than stock of Wilmington Trust Company or The News-Journal Company; or

(c) by Christiana in the event the Agreement of Merger shall not be approved by its stockholders by the requisite vote.

14. AMENDMENTS.

This Agreement may be amended or modified only by a written instrument executed by Christiana and Du Pont acting by their respective officers thereunto duly authorized by their respective Boards of Directors. No such amendment shall be made to the Agreement of Merger after it shall have been adopted by the shareholders of Christiana or Du Pont.

15. NOTICES.

All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered or mailed, first class postage prepaid,

(a) if to Christiana, marked to the attention of Mr. Irénée du Pont, Jr., President, Christiana Securities Company, Du Pont Building, Wilmington, Delaware 19898, or

(b) if to Du Pont, marked to the attention of Mr. Charles B. McCoy, Chairman and President, E. I. du Pont de Nemours and Company, Du Pont Building, Wilmington, Delaware 19898,

or to such other persons or such other address as shall be furnished in writing by either party to the other.

16. COUNTERPARTS.

This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

17. GOVERNING LAW.

This Agreement shall be construed and enforced in accordance with the laws of the State of Delaware.

IN WITNESS WHEREOF, the undersigned parties hereto have duly executed this Agreement on the date first above written.

(SEAL)

CHRISTIANA SECURITIES COMPANY

Attest:

/s/ T. E. HOUSE
Assistant Secretary

By /s/ IRÉNÉE DU PONT, JR.
President

(SEAL)

E. I. DU PONT DE NEMOURS AND COMPANY

Attest:

/s/ S. A. MILLINER, JR.
Assistant Secretary

By /s/ C. B. McCOY
Chairman of the Board and President

Exhibit A

AGREEMENT OF MERGER

THIS AGREEMENT OF MERGER, dated as of the 20th day of December, 1972, is made pursuant to Section 251 of the General Corporation Law of the State of Delaware by and between CHRISTIANA SECURITIES COMPANY, a Delaware corporation (hereinafter sometimes called "Christiana"), and E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation (hereinafter sometimes called "Du Pont" or the "Surviving Corporation"). Christiana and Du Pont are referred to herein collectively as the "Constituent Corporations".

WITNESSETH:

The Constituent Corporations have agreed that Christiana shall be merged into Du Pont and that the terms and conditions of said Merger, the plan and mode of carrying the same into effect, the amendment of the Certificate of Incorporation of Du Pont as the Surviving Corporation, the manner of converting shares of Christiana into shares of DuPont and cash the holders of shares of Christiana are to receive, the retirement of certain shares of Du Pont's capital stock, and other matters with respect to the Merger are and shall be as follows:

First. Upon the effective date of the Merger, as defined in Article Third hereof (the "Effective Date"), Christiana shall be merged into Du Pont which shall be the Surviving Corporation and which shall continue its corporate existence and remain a Delaware corporation governed by the laws of the State of Delaware.

Second. (a) The corporate name of the Surviving Corporation shall remain E. I. du Pont de Nemours and Company;

(b) The Certificate of Incorporation of Du Pont shall be amended as follows:

The second and third paragraphs of Article FOURTH shall be deleted and in their place shall be inserted the following paragraph:

> "The total number of shares of all classes of stock which the corporation shall have authority to issue shall be Sixty-nine Million (69,000,000), of which Four Million (4,000,000) shares shall be Preferred Stock without par value and Sixty-five Million (65,000,000) shares shall be Common Stock having a par value of Five Dollars ($5.00) each."

The Certificate of Incorporation of the Surviving Corporation shall not be amended in any other respect by reason of the Merger, and the Certificate of Incorporation of the Surviving Corporation as heretofore amended and as further amended hereby shall be the Certificate of Incorporation of the Surviving Corporation until any further amendment is made pursuant to the laws of the State of Delaware;

(c) The By-Laws of Du Pont shall be the By-Laws of the Surviving Corporation and shall continue in force and effect, until duly altered, amended or repealed; and

(d) The directors of Du Pont on the Effective Date shall constitute the Board of Directors of the Surviving Corporation and shall serve until the next annual meeting of stockholders of the Surviving Corporation, and until their successors are chosen and shall have qualified, as provided in the By-Laws of the Surviving Corporation.

Third. When this Agreement of Merger has been adopted by vote of the holders of a majority of the issued and outstanding shares of Christiana and of Du Pont en-

titled to vote thereon, it shall, subject to conditions specified in an Agreement and Plan of Reorganization between the Constituent Corporations dated December 20, 1972, be executed, acknowledged and submitted for filing in the manner prescribed by Section 251 of the General Corporation Law of the State of Delaware. This Agreement of Merger shall become effective at the close of business on the date it is so filed with the Secretary of State of Delaware. Such date is referred to herein as the Effective Date.

Fourth. Upon the Effective Date, the separate existence of Christiana shall cease and the Surviving Corporation shall thereupon and thereafter possess all of the rights, privileges, powers and franchises as well of a public as of a private nature, and be subject to all the restrictions, disabilities and duties of each of such corporations so merged; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to each of the Constituent Corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of the Constituent Corporations shall be vested in the Surviving Corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the Surviving Corporation as they were of the respective Constituent Corporations, and the title to any real estate, vested by deed or otherwise, under the laws of the State of Delaware, in either of the Constituent Corporations shall not revert or be in any way impaired by virtue of such Merger; but all rights of creditors and all liens upon any property of the Constituent Corporations shall be preserved unimpaired, and all debts, liabilities and duties of the Constituent Corporations shall thenceforth attach to

the Surviving Corporation and may be enforced against it to the same extent as if the said debts, liabilities and duties had been incurred or contracted by it.

If at any time the Surviving Corporation shall consider or be advised that any further assignments or assurances in law or other things are necessary or desirable to vest, or to perfect or to confirm, of record or otherwise, in the Surviving Corporation, the title to any property of Christiana acquired or to be acquired as a result of the Merger provided for herein, both the proper officers and directors of Christiana and the proper officers and directors of the Surviving Corporation are fully authorized to execute and deliver any and all proper deeds, assignments and assurances in law and to do all things necessary and proper in the name of Christiana or otherwise so as to vest, perfect or confirm title to such property in the Surviving Corporation, and otherwise carry out the purposes of this Agreement of Merger.

Fifth. The manner and basis of converting the issued and outstanding shares of each of the Constituent Corporations and of retiring certain stock of the Surviving Corporation shall be as follows:

(a) Each share of Seven Per Cent. Cumulative Non-voting Preferred Stock of Christiana ($100 par value) issued and outstanding on the Effective Date shall be converted into and become (i) such number of shares, or fraction thereof, of fully paid and non-assessable Common Stock ($5.00 par value) of Du Pont, theretofore authorized and unissued, as is determined by dividing $120 by the average of the closing prices of Du Pont Common Stock on the New York Stock Exchange for the ten trading days immediately preceding the Effective Date plus (ii) an amount in cash equal to the dividend accrued and unpaid on

said Preferred Stock up to and including the Effective Date. The Common Stock capital account of Du Pont shall thereupon be increased by the aggregate par value of said shares issued in the conversion.

(b) Each share of Christiana Common Stock ($1.25 par value) issued and outstanding on the Effective Date shall be converted into 1.123 shares of Common Stock ($5.00 par value) of Du Pont, theretofore authorized and unissued, (the "Effective Date Distribution") and, in addition, a pro rata portion of any shares of Du Pont Common Stock distributed on or prior to the fifth anniversary of the Effective Date, in any Contingent Share Distribution. The Contingent Share Distribution shall be the number of shares of Du Pont Common Stock determined by dividing the Final Recovery (as defined below) in *Christiana Securities Co. v. United States*, C. A. No. 3831 in the United States District Court for the District of Delaware (the "Tax Claim") by the average of the closing prices of Du Pont Common Stock on the New York Stock Exchange for the ten trading days immediately preceding the date on which such Final Recovery is made. No certificate or scrip with respect to the Contingent Share Distribution shall be issued, and a stockholder's interest therein shall not be assignable except by will or by operation of law. Du Pont's obligation to make such Contingent Share Distribution shall be discharged, and distribution thereof shall be deemed to be made, by conveying, within ten days after the date on which such Final Recovery is made, the shares of Du Pont Common Stock to an agent for the holders of record of Christiana Common Stock on the Effective Date designated by the Tax Claim Committee referred

to below for distribution in accordance with the terms of this Agreement of Merger. In the event the Final Recovery shall be received prior to the Effective Date, the Effective Date Distribution shall be increased by a pro rata share of the number of shares of Du Pont Common Stock obtained by dividing the Final Recovery by $163.875 and there shall be no Contingent Share Distribution. The Common Stock capital account of Du Pont shall be increased by the aggregate par value of shares issued in the conversion constituting the Effective Date Distribution.

(I) Final Recovery shall mean, with respect to the Tax Claim, any amount recovered by settlement as well as by entry of a judgment which shall have become final, including amounts attributable to interest, with the following adjustments:

(i) less the amount, if any, by which the expenses paid or incurred with respect to the Tax Claim subsequent to July 17, 1972 exceed $1,000,000;

(ii) less the applicable income taxes payable by Du Pont or Christiana with respect to the Final Recovery, the rate and amount of such income taxes to be determined by Du Pont;

(iii) less the cost of making the Contingent Share Distribution;

(iv) plus the amount (whether or not any monetary judgment shall be entered), if any, by which the expenses paid or incurred with respect to the Tax Claim subsequent to July 17, 1972 are less than $1,000,000;

(v) plus the sum of the amounts determined at the end of each calendar quarter ending after July 17, 1972 through the date of Final Recovery by multiplying $1,000,000 less the total amount of expenses paid since July 17, 1972 with respect to the Tax Claim by ⅛ of the then prevailing prime commercial lending rate of interest of Morgan Guaranty Trust Company of New York;

(vi) plus the amount of any reduction in income taxes of Du Pont and Christiana resulting from expenses with respect to the Tax Claim paid or incurred after July 17, 1972, the rate and amount of such income taxes to be determined by Du Pont or Christiana as the case may be; provided, however, that no adjustment shall be made under this clause (vi) for reduction in income taxes of Du Pont unless the Internal Revenue Service shall have issued a ruling that such expenses are deductible for Federal income tax purposes; and

(vii) plus, if the Contingent Share Distribution is not distributed within one year after the Effective Date, an amount equal to the Final Recovery adjusted as set forth in clauses (i) through (vi) above multiplied by a factor determined by the following formula:

$$\text{Factor} = \frac{.04rt}{1 + .04t - .04rt}$$

where r is the rate of income taxes determined by Du Pont for purpose of clause (ii) above and t is the years and decimal fraction of a year from the Effective Date to the date of Final Recovery; provided, however, that no adjustment shall be made under this clause (vii) unless the Internal Revenue Service shall have issued a ruling that such amounts determined to be the payment of interest under (II) below are deductible by Du Pont for Federal income tax purposes.

The Final Recovery shall be deemed to have occurred when payment is received by Du Pont or Christiana from the United States of America in full settlement of the Tax Claim or in full discharge of any final judgment, or if a judgment denying monetary relief is entered, the date on which such judgment becomes final. In the event that there shall have been no such Final Recovery on or before the 150th day preceding the fifth anniversary of the Effective Date, Du Pont agrees to negotiate in good faith with the Tax Claim Committee to determine the amount which represents the fair value of the Tax Claim at such time. In the event that Du Pont and the Tax Claim Committee are unable to agree on an amount before the 120th day preceding the fifth anniversary of the Effective Date, they shall, within three days after such date, each deliver a written notice to the other designating one appraiser. The two appraisers so designated shall select a third appraiser. In the event that the designated appraisers are unable, or fail, within seven days after their appointment, to agree upon

the third appraiser, they or either of them shall immediately request the American Arbitration Association to appoint a third appraiser in accordance with its rules as to appointment of a neutral arbitrator. The third appraiser so selected or appointed shall act as chairman. The appraisers shall meet at the call of the chairman and take such proceedings as they deem necessary to determine the then fair value of the Tax Claim. Within ninety days after the appointment of the third appraiser, but no later than the tenth business day preceding the fifth anniversary of the Effective Date, the appraisers shall deliver to Du Pont and the Tax Claim Committee in writing a statement specifying the then fair value of the Tax Claim. The decision of a majority of such appraisers shall be final and conclusive unless a majority are unable to agree, in which event the determination of the chairman shall be final and conclusive. The amount agreed upon between Du Pont and the Tax Claim Committee or, in the absence of such agreement, the amount determined by the appraisers, representing the then fair value of the Tax Claim shall be supported by a statement specifying the portions thereof deemed to be (1) recovery of tax paid, (2) recovery of interest paid and (3) interest on both of these items, and shall be treated for all purposes hereunder as though it were an amount recovered by settlement of the Tax Claim on the date of such agreement or of such determination by appraisal.

(II) If the Contingent Share Distribution is not distributed within one year after the Effective Date, a portion of any Contingent Share Distribution shall be deemed the payment of interest on a deferred payment (the "Interest Shares") and the balance shall be deemed to be the payment of principal (the "Principal Shares"). The portion deemed payment of interest shall be determined by multiplying the Final Recovery by a factor determined by the following formula:

$$\text{Factor} = 1 - \frac{1}{1 + .04t}$$

where *t* is the years and decimal fraction of a year from the Effective Date to the date of distribution of the Contingent Share Distribution.

(III) If the Contingent Share Distribution occurs within one year after the Effective Date, the maximum number of shares of Du Pont Common Stock which may be issued in the Contingent Share Distribution is 300,000 shares. If the Contingent Share Distribution occurs more than one year after the Effective Date, the maximum number of Principal Shares which may be issued as part of the Contingent Share Distribution is 300,000 shares. The maximum number of shares of Du Pont Common Stock referred to above shall be appropriately adjusted in the event of any division, combination or modification of Du Pont Common Stock, whether through recapitalization, stock split, stock dividend or otherwise. In the event that the maximum number of Principal Shares applies as the result of computing the number of Principal Shares under subparagraph (II), subparagraph (II) shall not apply to deter-

mine the number of Interest Shares to be distributed and there shall be distributed as interest the lesser of (a) a number of Interest Shares equal to the number of Principal Shares multiplied by a factor equal to six percent per annum simple interest from the Effective Date to the date of distribution of the Contingent Share Distribution, or (b) the excess of the Contingent Share Distribution (determined without regard to this subparagraph) over the maximum number of Principal Shares.

(IV) All matters relating to prosecution and settlement of the Tax Claim and the Contingent Share Distribution shall be determined by a special Tax Claim Committee consisting of the members of the Board of Directors of Christiana as constituted on the Effective Date. If any vacancies shall occur among the members of the Tax Claim Committee, those remaining in office shall appoint replacements. The Tax Claim Committee shall have authority to the same extent as the board of directors of a corporation organized under the General Corporation Law of the State of Delaware.

(c) Except as provided in paragraph (c) of this Article Fifth, each share of Common Stock of Du Pont ($5.00 par value) issued and outstanding or held in treasury by Du Pont on the Effective Date shall remain unchanged and unaffected by the Merger.

(d) Except as provided in paragraph (e) of this Article Fifth, each share of any series of Preferred Stock of Du Pont issued and outstanding or held in treasury by Du Pont on the Effective Date shall remain unchanged and unaffected by the Merger.

(e) Each share of Common Stock ($5.00 par value) and $4.50 Series Cumulative Preferred Stock of Du Pont held by Christiana on the Effective Date and received by Du Pont in the Merger shall be forthwith retired and restored to the status of authorized and unissued shares, and the capital of Du Pont shall be automatically reduced by the aggregate amount of capital attributable on the Effective Date to—

1) the shares of Preferred Stock then retired, at the stated value thereof, and

2) the shares of Common Stock then retired, at par value thereof.

A Certificate of Reduction of Capital shall be filed pursuant to Section 244 of the General Corporation Law of the State of Delaware.

(f) Subject to the limitations of Article Sixth and to the provisions herein with respect to a Contingent Share Distribution, the conversion of the shares of Christiana capital stock pursuant to this Agreement of Merger shall be complete and effective on the Effective Date without regard to the date or dates upon which certificates representing shares of Christiana shall be surrendered by the holders thereof for certificates representing Du Pont Common Stock as hereinafter provided. Until so surrendered and subject to the limitations of Article Sixth, certificates for shares of Christiana Preferred Stock shall be deemed for all purposes from and after the Effective Date to evidence the ownership of the number of full shares of Du Pont Common Stock into which such shares of Christiana Preferred Stock shall have been converted as of the Effective Date as herein provided and certificates for

shares of Christiana Common Stock shall be deemed for all purposes from and after the Effective Date to evidence the ownership of the number of full shares of Du Pont Common Stock into which such shares of Christiana Common Stock shall have been converted by reason of the Effective Date Distribution. Subject to the limitations of Article Sixth, (i) upon surrender by any holder of certificates representing shares of Preferred Stock of Christiana, Du Pont shall issue certificates representing the full shares of Du Pont Common Stock to which such stockholder shall be entitled by reason of the conversion as of the Effective Date and the cash payment with respect thereto and (ii) upon surrender by any holder of certificates representing shares of Common Stock of Christiana, Du Pont shall issue certificates representing the full shares of Du Pont Common Stock to which such stockholder shall be entitled by reason of the Effective Date Distribution.

(g) No fractional shares of Du Pont Common Stock or certificate or scrip representing the same shall be issued in connection with the Merger. In lieu thereof each holder of Du Pont Common Stock having a fractional interest arising upon the Effective Date will be afforded the opportunity through the exchange agent for such stock, on or before the 40th day following the Effective Date, either to consolidate his fractional interest into one full share of such stock by purchasing and paying for the additional fractional interest required for such consolidation, or to sell his fractional interest and obtain the proceeds thereof. Any fractional interest with respect to which instructions shall not have been received by the exchange agent within the prescribed period shall be sold. Buying and selling orders may be offset, but they will be exercised at prices determined by market transactions. The proceeds of any sale of a fractional interest shall be paid in cash by the exchange agent to the stockholder entitled to the fractional interest sold, except that the exchange agent shall not pay such proceeds to any such stockholder who shall not have surrendered his certificates for exchange pursuant to Article Sixth, and shall retain such proceeds until such time as such certificates have been so surrendered. The same procedure shall be utilized for the treatment of fractional interests arising out of any Contingent Share Distribution. The exchange agent shall be the agent of the stockholders entitled to such fractional share interests and shall act on behalf of such stockholders pursuant to instructions of Du Pont or the Tax Claim Committee, as the case may be.

(h) Notwithstanding the provisions of paragraph (a) of this Article Fifth, no share of Christiana Preferred Stock, the holder of which has, within the time periods specified in Section 262 of the General Corporation Law of the State of Delaware, objected to the Merger and made demand upon the Surviving Corporation for payment of the value of such share shall be deemed converted hereunder; provided, however, that any such share, the holder of which shall, with the approval of the Surviving Corporation, withdraw his objection to the Merger, shall be deemed converted hereunder as of the Effective Date.

Sixth. After the Effective Date, each holder of an outstanding certificate or certificates theretofore representing capital stock of Christiana shall surrender the same to an agent or agents designated by Du Pont (accompanied

by such instruments of transfer as Du Pont may reasonably require), and each holder shall upon such surrender receive in exchange therefor a certificate or certificates representing the shares of Du Pont Common Stock to which such stockholder is entitled on the Effective Date (excluding any shares to be distributed in any Contingent Share Distribution) by reason of the Merger together with any additional share which may have been purchased, or the proceeds of any fractional share sold pursuant to Article Fifth hereof, and, in the case of Christiana Preferred Stock, the cash payment. Until the surrender of a certificate or certificates evidencing the Christiana shares, any dividend or other distributions in respect of such shares of Du Pont Common Stock shall be accumulated and not paid or delivered, but at the time of such surrender, any such dividends or other distributions shall be paid or delivered in full but without interest thereon.

Seventh. Anything herein to the contrary notwithstanding, this Agreement of Merger may be terminated and the Merger may be abandoned at any time prior to the Effective Date:

(a) by mutual agreement evidenced by resolutions of the Boards of Directors of the parties hereto; and

(b) by either party hereto if any condition precedent to its obligation under an Agreement and Plan of Reorganization between the parties dated December 20, 1972, is not met.

IN WITNESS WHEREOF, this Agreement has been executed by each of the Constituent Corporations, by its Chairman of the Board or its President or a Senior Vice President or a Vice President and attested by the Secretary or an Assistant Secretary of each of the Constituent

Corporations under its corporate seal, all on the date first above written.

[CORPORATE SEAL] CHRISTIANA SECURITIES COMPANY

Attest:

/s/ T. E. HOUSE
Assistant Secretary

By /s/ IRÉNÉE DU PONT, JR.
President

[COR. ORATE SEAL] E. I. DU PONT DE NEMOURS AND COMPANY

Attest:

/s/ S. A. MILLINER, JR.
Assistant Secretary

By /s/ C. B. MCCOY
Chairman of the Board and President

I, , Secretary of CHRISTIANA SECURITIES COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereby certify as follows:

1. The foregoing Agreement of Merger was adopted and approved by the Board of Directors of CHRISTIANA SECURITIES COMPANY in accordance with Section 251 of the General Corporation Law of the State of Delaware and was executed by its President and attested by the Secretary of CHRISTIANA SECURITIES COMPANY under its corporate seal in accordance with Section 103 of the General Corporation Law of the State of Delaware.

2. Thereafter, the foregoing Agreement of Merger was submitted to the stockholders of CHRISTIANA SECURITIES COMPANY, at a meeting thereof duly called for the purpose of acting on said Agreement of Merger and at said meeting a majority of the outstanding shares of the capital stock of CHRISTIANA SECURITIES COMPANY entitled to vote thereon were voted for the adoption of the foregoing Agreement of Merger.

IN WITNESS WHEREOF, I have hereunto signed my name as Secretary of CHRISTIANA SECURITIES COMPANY and affixed the seal of said corporation this day of , 1973.

.....
Secretary

[CORPORATE SEAL]

I, , Secretary of E. I. DU PONT DE NEMOURS AND COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereby certify as follows:

1. The foregoing Agreement of Merger was adopted and approved by the Board of Directors of E. I. DU PONT DE NEMOURS AND COMPANY, in accordance with Section 251 of the General Corporation Law of the State of Delaware and was executed by the Chairman of the Board and President and attested by the Secretary of E. I. DU PONT DE NEMOURS AND COMPANY, under its corporate seal, in accordance with Section 103 of the General Corporation Law of the State of Delaware.

2. Thereafter, the foregoing Agreement of Merger was submitted to the stockholders of E. I. DU PONT DE NEMOURS AND COMPANY, at a meeting thereof duly called for the purpose of acting on said Agreement of Merger and at said meeting a majority of the outstanding shares of the capital stock of E. I. DU PONT DE NEMOURS AND COMPANY entitled to vote thereon were voted for the adoption of the foregoing Agreement of Merger.

IN WITNESS WHEREOF, I have hereunto signed my name as Secretary of E. I. DU PONT DE NEMOURS AND COMPANY and affixed the seal of said corporation this day of , 1973.

.....
Secretary

[CORPORATE SEAL]

The foregoing Agreement of Merger having been duly adopted by the stockholders of CHRISTIANA SECURITIES COMPANY, a Delaware corporation, and by the stockholders of E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation, and the fact of the adoption thereof as aforesaid having been duly certified thereon by the Secretary of CHRISTIANA SECURITIES COMPANY, and by the Secretary of E. I. DU PONT DE NEMOURS AND COMPANY, respectively, all in accordance with law, said Agreement of Merger is hereby executed by the Chairman of the Board or the President or a Senior Vice President or a Vice President and attested by the Secretary or an Assistant Secretary of each of said Corporations thereunto duly authorized, under its respective corporate seal, this day of , 1973.

CHRISTIANA SECURITIES COMPANY

By .....

[CORPORATE SEAL]

Attest:

.....
Secretary

E. I. DU PONT DE NEMOURS AND COMPANY

By .....

[CORPORATE SEAL]

Attest:

.....
Secretary

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

BE IT REMEMBERED that on this day of , 1973, personally came before me, a Notary Public in and for the county and state aforesaid,
of CHRISTIANA SECURITIES COMPANY, a corporation of the State of Delaware and one of the corporations described in and which executed the foregoing Agreement of Merger, known to me personally to be such, and he the said as such duly executed said Agreement of Merger before me and acknowledged said Agreement of Merger to be his act and deed and the act, deed and agreement of said CHRISTIANA SECURITIES COMPANY, that the facts stated therein are true, that his signature to said foregoing Agreement of Merger is in his handwriting, and that the seal affixed to said Agreement of Merger is the corporate seal of CHRISTIANA SECURITIES COMPANY.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office the day and year aforesaid.

[NOTARIAL SEAL]

.....
Notary Public

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

BE IT REMEMBERED that on this day of , 1973, personally came before me, a Notary Public in and for the county and state aforesaid, of E. I. DU PONT DE NEMOURS AND COMPANY, a corporation of the State of Delaware and one of the corporations described in and which executed the foregoing Agreement of Merger, known to me personally to be such, and he the said , as such duly executed said Agreement of Merger before me and acknowledged said Agreement of Merger to be his act and deed and the act, deed and agreement of said E. I. DU PONT DE NEMOURS AND COMPANY, that the facts stated therein are true, that his signature to said foregoing Agreement of Merger is in his handwriting, and that the seal affixed to said Agreement of Merger is the corporate seal of E. I. DU PONT DE NEMOURS AND COMPANY.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office the day and year aforesaid.

[NOTARIAL SEAL]

.....
Notary Public

APPLICANTS' JOINT EXHIBIT NO. 5.

(1 page summary only)

STUDY OF SELECTED MERGERS

Subject to Investment Company Act of 1940

Pages	*Company Acquired/ Surviving Company*	*Relationship of Value Paid to Net Asset Value*	*Relationship of Market Value of Company Acquired to Its Net Asset Value*
1-2	Detroit & Cleveland Navigation Co./Denver Chicago Trucking Company, Inc.	Equal to net asset value	16.9% discount at 6/29/60 (Net asset value as of 4/30/60)
3-4	Delaware Realty & Investment Company/ Christiana Securities Company	1.5% discount from adjusted net asset value	N.A.
5-6	Prudential Investing Corporation/Axe Houghton Fund, Inc.	Equal to net asset value (after 2% adjustment for Leffler's fee)	17.6% discount at 12/16/46
7-8	Huyler's/Altamil Corporation	Equal to net asset value	N.A.
9-10	Eastern States Corporation/St. Regis Paper Company	Equal to net asset value	2.5% discount at 1/31/69
11-12	Harbor Plywood Corporation/Hunt Foods and Industries, Inc.	Equal to net assset value (after $1.65 upward adjustment of net asset value)	13.5% discount at 9/30/61
	Not Subject to Investment Company Act of 1940		
13-15	United States Foil Company/Reynolds Metals Company	Equal to net asset value	24.1% discount at 5/12/60
16-17	Beneficial Corporation/ Beneficial Finance Co.	.6% premium over net asset value	17.3% discount at 11/30/67

Pages	*Company Acquired/ Surviving Company*	*Relationship of Value Paid to Net Asset Value*	*Relationship of Market Value of Company Acquired to Its Net* Asset Value
18-19	United Utilities Company/American Water Works Company, Inc.	Equal to net asset value	N.A.
20-21	Eccles Investment Company/Utah Construction & Mining Co.	1.83% discount from net asset value	N.A.

DU PONT EXHIBIT NO. 1

E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED
WILMINGTON, DELAWARE

EXECUTIVE OFFICES

June 6, 1972

The First Boston Corporation
20 Exchange Place
New York, New York 10005

Gentlemen:

The Board of Directors of E. I. du Pont de Nemours and Company has designated a Committee to negotiate a proposed merger of Christiana Securities Company into Du Pont. We request that The First Boston Corporation advise such Committee concerning the financial aspects of the proposed merger.

We would like you to render an opinion and accompanying report, based upon a financial analysis and evaluation and taking into consideration all material factors you believe to be relevant, to assist the Du Pont Committee in its negotiations. Your report should set forth a range of ratios of exchange of Christiana Common Stock for Du Pont Common Stock and recommendations as to terms of exchange of Christiana Preferred Stock which you consider fair and reasonable to both Du Pont and Christiana and the shareholders of each such company. The merger will be subject to the approval of the Securities and Exchange Commission under the provisions of Section 17 of the Investment Company Act of 1940, which provides that as a prerequisite to approval, the Commission must determine, among other things, that the terms of the pro-

BEST COPY AVAILABLE

posed transaction are reasonable and fair and do not involve overreaching on the part of any person concerned.

We understand that you will undertake the study necessary to prepare such report and formulate such opinion immediately with a view to furnishing such material by June 20, 1972 or as promptly thereafter as is practicable. If you are willing to accept this assignment, please sign a copy hereof and return it to us.

Very truly yours,

E. I. Du Pont de Nemours and Company

Special Committee of the
Board of Directors:

/s/ C. B. McCoy
C. B. McCoy
/s/ I. S. Shapiro
I. S. Shapiro

The foregoing assignment
is hereby accepted.

The First Boston Corporation
By /s/ Edward Townsend
Senior Vice President

DU PONT EXHIBIT NO. 3.

Excerpts from
Brief for the United States
before the Supreme Court
in the
General Motors "Relief Proceedings"
(October Term, 1960—No. 55)

No. 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

—

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DUPONT DE NEMOURS AND COMPANY, ET AL.

—

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

—

BRIEF FOR THE UNITED STATES

—

J. LEE RANKIN,
Solicitor General.
ROBERT A. BICKS,
Assistant Attorney General.
JOHN F. DAVIS,
Assistant to the Solicitor General.
CHARLES H. WESTON,
GEORGE D. REYCRAFT,
BILL G. ANDREWS,
Attorneys.
Department of Justice, Washington 25, D.C.

62

* * *

With respect to the threatened disruption of the market for du Pont and General Motors stocks, the basis for the court's findings is that a large volume of stock will be poured out into the market in a short period of time, partially by reason of the direct requirement that General Motors stock received by Christiana and Delaware be sold and partly by voluntary sales by other du Pont stockholders made necessary in order to pay taxes or to avoid tax problems.[40] We of course agree that consideration of such foreseeable effects of a plan of divestiture are a proper consideration for a court in framing a decree; a court should not impose requirements which will cause stock to be dumped on the market faster than it can be digested. But once a court has taken every precaution to encourage an orderly distribution and has given the parties concerned the opportunity within the framework of a divestiture order to arrange the program so as to fit in most readily with their financial needs, then the court cannot speculate as to intermediate short-range market fluctuations.

* * *

---

[40] Merger of Christiana and Delaware with du Pont, which would be tax free, would sharply reduce the amount of General Motors stock to be sold by the trustee by eliminating the distributions of General Motors stock to Christiana and Delaware which under the present setup would be made on account of the du Pont holdings of those two companies (R. 64-66). The reduction would be from a little over 19,000,000 shares to 535,500 shares. (See R. 3210.)

70

* * *

* * * The evidence shows dividend payments of this kind by another company (R. 2543, 2545), and du Pont itself paid such a dividend in 1935 (Moody's 1936 *Industrial Manual,* p. 1950).[50]

(3) *Sale of General Motors Shares.* Under the suggested judgment du Pont would be free to divest by utilizing any or all of various selling techniques. It would also be unrestricted as to those to whom sale could be made except that, because of the close ties between Christiana, Delaware and du Pont, the judgment should bar sale to either of these du Pont-tied holding companies.[51]

Du Pont stockholders would be subjected to no tax liability by reason of du Pont's sale of General Motors shares.

* * *

---

[50] The district court believed it certain that, if du Pont retained funds because of distributing to its stockholders General Motors shares rather than cash, this would "enhance the power and position of the du Pont Company and perhaps create new antitrust problems for both the Company and the Department of Justice in the future" (R. 3248). But it would be sound corporate practice for du Pont to utilize most of the retained funds to purchase and retire its stock, thereby reducing its capital stock account in rough correspondence with the reduction in assets caused by divestment of General Motors stock. Furthermore, such purchases would create additional demand for du Pont stock, and this demand would offset such additional supply as resulted from selling by stockholders dissatisfied with dividends paid partly in cash and partly in stock.

[51] We note that Christiana and Delaware have announced plans to merge, contingent upon obtaining requested clearance by the Internal Revenue Service and the Securities & Exchange Commission. Consummation of the planned merger would render moot a ban in the antitrust judgment against sales to Delaware. Moreover, if Christiana and du Pont should merge, following merger of Christiana and Delaware, this would render moot all restrictions of the antitrust judgment relating to Christiana and Delaware.

83

* * *

Conclusion

It is respectfully submitted that the judgment of the district court should be reversed, with directions to determine, in conformity with the opinion of this Court, the relief which is necessary and appropriate; that the Court's opinion should give the district court directions of the kind suggested under Point IV of this brief; and that the Court's opinion should approve Sections IV to X, inclusive, of the judgment entered on November 17, 1959, as appropriate prohibitions or commands to remain in effect pending entry of final judgment on the second remand to the district court.

J. Lee Rankin,
Solicitor General.
Robert A. Bicks,
Assistant Attorney General.
John F. Davis,
Assistant to the Solicitor General.
Charles H. Weston,
George D. Reycraft,
Bill G. Andrews,
Attorneys.

November 1960.

---

[64] *Decrees and Judgments in Civil Federal Anti-Trust Cases* 687, 690.

U.S. GOVERNMENT PRINTING OFFICE, 1960

DU PONT EXHIBIT NO. 4.

(exclusive of exhibits)

THE FIRST BOSTON CORPORATION
MEMBER NEW YORK STOCK EXCHANGE, INC.

20 EXCHANGE PLACE
NEW YORK, N. Y. 10005

July 6, 1972

Messrs.
C. B. McCoy
I. S. Shapiro
Special Committee of the Board of Directors
E. I. du Pont de Nemours and Company
Wilmington, Delaware 19898

Gentlemen:

By letter of April 20, 1972 Mr. Irénée du Pont, Jr., President of Christiana Securities Company, wrote Mr. McCoy enquiring whether the Du Pont Company would be interested in considering a possible merger of Christiana into the Du Pont Company. Subsequently, the two companies appointed special committees of their boards to consider such a merger.

By letter of June 6, 1972 you requested The First Boston Corporation to advise your Committee concerning the financial aspects of the proposed merger. You said you would like us to render an opinion and accompanying report, based upon a financial analysis and evaluation and taking into consideration all material factors we believe to be relevant. You further stated that our report should set forth a range of ratios of exchange of Christiana Common Stock for Du Pont Common Stock and recommendations as to terms of exchange of Christiana Preferred Stock which we consider fair and reasonable to both Du Pont and Christiana and the shareholders of each company. You pointed out that the merger will be subject to the approval of the Securities and Exchange Commission under the provisions of Section 17 of the Investment Company Act of 1940, "which provides that as a prerequisite to approval, the Commission must determine, among other things, that the terms of the proposed transaction are reasonable and fair and do not involve overreaching on the part of any person concerned". We accepted the assignment.

You have indicated to us your view that the principal advantages of the proposed merger (and, based upon our study, we share the view) are

a) to the Du Pont Company and its shareholders a termination of the long-standing affiliation with Christiana under the Investment Company Act of 1940, as a result of which a number of business decisions of the Du Pont Company over the years have been impeded and delayed by reason of regulatory requirements,

b) to Christiana and its shareholders (i) the elimination of significant reductions in dividend income by reason of income taxes and administrative expenses, and (ii) a marked improvement in market price, as well as the enhanced marketability of the Du Pont shares over that of the present Christiana shares.

You have supplied us with all the information—financial, legal, regulatory, and accounting—which you or we considered requisite to our study of the proposed merger.

Responsive to your request we submit this opinion letter and, under separate cover, a report entitled "Study

of Proposed Merger of Christiana Securities Company into E. I. du Pont de Nemours and Company".

Based upon our analysis and study we recommend to your Committee, given the financial conditions of the two companies and market conditions currently prevailing, that the Du Pont Company make an offer:

1) in the range of 1.108 and 1.139 shares of Du Pont Company Common Stock for each outstanding share of Christiana Common Stock, and

2) .705 share of Du Pont Company Common Stock for each outstanding share of Christiana 7% Preferred Stock.

In our Study we have arbitrarily assigned no value to Christiana's Federal Tax Claim. In recognition of this, and supplementing the foregoing, we recommend that the Du Pont Company undertake in the Merger Agreement to issue such number of shares (or fraction of a share) of Du Pont Company Common Stock for each outstanding share of Christiana Common Stock as shall in the aggregate (taken at a market price of Du Pont Company Common Stock not less than that prevailing on the effective date of merger) be equivalent to the recovery (if any) net of taxes and expenses on the Federal Tax Claim of Christiana, such shares (or fraction of a share) to be distributed to Christiana shareholders contingently upon there being a net recovery, failing which no such distribution would be made.

It is our opinion that the range of ratios of exchange of Du Pont Company Common Stock for Christiana Common Stock and the terms of exchange of Du Pont Company Common Stock for Christiana 7% Preferred Stock recommended above are fair and reasonable to both the Du Pont Company and to Christiana and to the shareholders of each such company. Moreover, in our judgment, the recommended terms of the proposed transaction do not involve overreaching on the part of any person concerned.

Very truly yours,

THE FIRST BOSTON CORPORATION
By /s/ EDWARD TOWNSEND
Edward Townsend
Senior Vice President

DU PONT EXHIBIT NO. 4

(Schedule 3)

MERGER EXCHANGE RATIOS AND CONSEQUENCES

Our financial analysis and evaluation of the two companies, after taking into account all factors we deemed to be relevant, leads us to the view that in the proposed merger the Du Pont Company should not suffer any dilution in earnings nor any other adverse financial effect. On the contrary there should be an inducement offered to Du Pont shareholders to vote affirmatively for the merger. That inducement, in our judgment, might reasonably be represented by an increase in pro forma per share earnings to Du Pont shareholders in the range of 8¢ to 2¢ and (indirectly related to such increase) a decrease in pro forma dividend requirements of Du Pont ranging from $1,910,000 to $85,000.

On the following page there are presented three exchange ratios of Du Pont Common Stock for Christiana Common Stock and the consequences which flow to Du Pont and Christiana shareholders respectively. These ratios and their consequences reflect the range of inducement to Du Pont shareholders which we recommend. Also presented is a constant exchange ratio of Du Pont Common Stock for Christiana 7% Preferred Stock and the related consequences.

Based upon our analysis and study, we believe these exchange ratios fall within a range of fairness and reasonableness to the shareholders of the two companies.

MERGER EXCHANGE RATIOS AND CONSEQUENCES

	I.	II.	III.
Each Common Share of Christiana Receives the Following Shares of Du Pont Common:	1.108	1.123	1.139
Each Preferred Share of Christiana Receives the Following Shares of Du Pont Common:	.705	.705	.705
Consequences to Christiana Common Shareholders (a):			
Market Value of Offer–Aggregate (000)/Per Share	$2,208,959 / $188.64	$2,238,864 / $191.19	$2,270,762 / $193.91
% Premium Over Market Price of $158.00 (5/31/72)	19.4%	21.0%	22.7%
Earnings Per Share, 1971	$8.18 ($7.38 x 1.108)	$8.25 ($7.35 x 1.123)	$8.34 ($7.32 x 1.139)
% Change From $5.28 (12/31/71)/$7.96(b)	54.9% / 2.8%	56.3% / 3.6%	58.0% / 4.8%
Earnings Per Share, LTM to 3/31/72	$8.78 ($7.92 x 1.108)	$8.86 ($7.89 x 1.123)	$8.95 ($7.86 x 1.139)
% Change From $5.28 (12/31/71)/$8.56(b)	66.3% / 2.6%	67.8% / 3.5%	69.5% / 4.6%
New Dividend Income	$5.54	$5.615	$5.695
% Change From $5.25	5.5%	6.9%	8.5%
Consequences to Christiana Preferred Shareholders (c):			
Market Value of Offer–Aggregate (000)/Per Share	$ 12,783 / $120.03	$ 12,783 / $120.03	$ 12,783 / $120.03
% Premium Over Market Price of $100.00 (5/31/72)	20.0%	20.0%	20.0%
New Dividend Income	$3.525	$3.525	$3.525
% Change From $7.00	(49.6)%	(49.6)%	(49.6)%

	Before Merger		After Merger		After Merger		After Merger	
	Aggregate		Aggregate	% of Total	Aggregate	% of Total	Aggregate	% of Total
Consequences to Du Pont								
Du Pont Common Shares Outstanding (d)	47,445,810		34,028,690	72.3%	34,028,690	72.0%	34,028,690	71.7%
Issued to Christiana (e)			13,049,876	27.7	13,225,528	28.0	13,412,889	28.3
Total			47,078,566	100.0%	47,254,218	100.0%	47,441,579	100.0%
% Change in Common Shares Outstanding			(0.8%)		(0.4%)		(–%)	
% Du Pont Voting Rights to Former Christiana Shareholders (f)	26.95%		26.38%		26.64%		26.92%	
Market Value of Common (5/31/72)	*Aggregate (000)*	*Per Share*	*Aggregate (000)*		*Aggregate (000)*		*Aggregate (000)*	
Du Pont Common	$8,077,649	$170.25	$5,793,384(g)		$5,793,384(g)		$5,793,384(g)	
Issued to Christiana Common and Preferred			2,221,741		2,251,646		2,283,544	
Total (Assumes No Change in Market Price of Du Pont Common)			$8,015,125		$8,045,030		$8,076,928	
New Dividend Payout								
Dividends on Common Issued (h)					$ 66,128		$ 67,064	
Less: Dividends on Preferred and Common Retired (i)			$ 65,249 67,159		67,159		67,159	
Net Decrease/(Increase) in Payout			$ 1,910		$ 1,031		$ 85	
			Per Share	*% Change*	*Per Share*	*% Change*	*Per Share*	*% Change*
Book Value (3/31/72) (j)	$2,865,000	$60.38	$61.57	2.0%	$61.34	1.6%	$61.09	1.2%
Earnings Per Share, 1971 (k)		$ 7.30	$ 7.38	1.1%	$ 7.35	0.7%	$ 7.32	0.3%
Earnings Per Share, LTM to 3/31/72 (k)		$ 7.84	$ 7.92	1.0%	$ 7.89	0.6%	$ 7.86	0.3%
Pro Forma Capitalization (000)	*Du Pont (3/31/72)*		*Pro Forma*		*Pro Forma*		*Pro Forma*	
Long-Term Debt	$ 234,100	6.9%	$ 234,100	6.9%	$ 234,100	6.9%	$ 234,100	6.9%
Preferred Stock at Liquidation Value	274,100	8.1	270,019	7.9	270,019	7.9	270,019	7.9
Common Equity	2,865,000	85.0	2,898,433	85.2	2,898,433	85.2	2,898,433	85.2
Total Capitalization	$3,373,200	100.0%	$3,402,552	100.0%	$3,402,552	100.0%	$3,402,552	100.0%

JMS – 7/6/72

Footnotes:

(a) Based on 11,710,103 common shares outstanding as of 5/1/72.

(b) Christiana earnings adjusted to an equity basis as follows:

	1971	*LTM*
Christiana Net Income Available for Common (12/31/71)	$61,895.079	$ 61,895.079
Add: Equity in DuPont Net Income Available for Common	98,131.600	105,201.600
Less: Dividends on Common Received	(67,085.600)	(67,085.600)
Add: Equity in Journal Net Income	497.800	497.800
Less: Dividends on Common Received	(238.720)	(238.720)
Adjusted Net Income	$93,200.159	$100,270.159
Based on 106,500 preferred shares outstanding as of 5/1/72.		
Shares outstanding (5/31/72)	47,445,810	
Less: Shares to be Retired	13,417,120	(28.3%)
Adjusted shares outstanding	34,028,690	

(c)

(d)

(e) Includes 75,082 common shares issued to Christiana preferred.

(f) Based on DuPont common and preferred shares outstanding as of 5/31/72.

(g) Excludes $2,284,265.000 in market value of common shares retired.

(h) Includes $375.400 dividends payable to former preferred shareholders.

(i) Includes $73.152 in $4.50 preferred dividends.

(j) Reported book value as of 3/31/72 plus market value of common issued plus difference between market value of common issued and net asset value of Christiana as of 5/31/72 as outlined in Addendum divided by actual common shares outstanding as shown above.

(k) Reported net income available for common for the period plus adjustments described in Schedule II divided by actual common shares outstanding as shown above.

JMS – 6/29/72

ADDENDUM TO SCHEDULE III

Relationship of Market Value Offered Christiana Common Under Alternative Exchange Ratios to Christiana Adjusted Net Asset Value as of May 31, 1972

(Aggregate $ Amount in Thousands)

Alternatives				I.		II.		III.	
Exchange Ratios for Common Stock				1.108		1.123		1.139	
Market Value of Offer				$188.64		$191.19		$193.91	
% Premium Over Market Price of $158.00 (5/31/72)				19.4%		21.0%		22.7%	
% (Discount From) Adjusted Net Asset Value of $196.83				(4.2)%		(2.9)%		(1.5)%	
								(1)	
Assets				Book Value (5/1/72)				Adjusted Net Asset Value (5/31/72)	
				Aggregate	*Per Share*			*Aggregate*	*Per Share*
Cash and Cash Equivalents Less Current Liabilities				$ 5,239	$0.45			$ 5,239	$ 0.45
	Shares Owned	%	*Market Price (5/31/72)*						
Investments									
Du Pont Common	13,417,120	28.28%	$170.25	$74,622	$6.37			$2,284,265	$195.07(a)
Du Pont $4.50 Preferred	16,256	0.96	69.125	1,298	0.11			1,124	0.10(a)
Wilmington Trust Common	69,216	3.45	40.75	904	0.08			2,820	0.24(a)
News-Journal Common	7,460	100.00	–	846	0.07			24,250	2.07(b)
Total				$77,670	$6.63			$2,312,459	$197.48
Deferred Charges (Claim for Tax Refund)				11,723	1.00			–	–
Total Assets				$94,632	$8.08			$2,317,698	$197.93
Less: Preferred Stock				(10,650)	(0.91)			(12,780)	(1.09)(c)
Total Net Assets				$83,982	$7.17			$2,304,918	$196.83
Common Shares Outstanding				11,710,103				11,710,103	

(1) *Assumptions for Adjusted Net Asset Value*

(a) Market Value of Du Pont Common, $4.50 Preferred and Wilmington Trust Common.

(b) Appraised value of News-Journal.

(c) 106,500 shares of Preferred Stock at call price of $120.00 per share.

JMS – 7/6/72

DU PONT EXHIBIT NO. 4A.

THE FIRST BOSTON CORPORATION

MEMBER NEW YORK STOCK EXCHANGE, INC.

20 EXCHANGE PLACE
NEW YORK, N. Y. 10005

July 7, 1972

Messrs.
C. B. McCoy
I. S. Shapiro
Special Committee of the Board of Directors
E. I. du Pont de Nemours and Company
Wilmington, Delaware 19898

Gentlemen:

We have transmitted to you by letter dated July 6, 1972, our Opinion Letter dated July 6, 1972 and a report entitled "Study of Proposed Merger of Christiana Securities Company into E. I. du Pont de Nemours and Company" also dated July 6, 1972.

A draft Opinion Letter and a draft Report, both dated June 29, 1972, were submitted and discussed with you and others whom you invited to be present on the evening of June 29, 1972 in Wilmington. On the following day, June 30, we participated in a meeting with you, the Special Committee of the Board of Directors of Christiana, and advisors to the two Committees.

We are advised that agreement has been reached by the two Committees and is to be embodied in a proposed "Agreement and Plan of Reorganization between E. I. du Pont de Nemours and Company and Christiana Securities Company" which is to be submitted to the Boards of Directors of the two companies.

We are further advised that such proposed Agreement will provide that Du Pont will offer 1.1225 shares of its Common Stock for each outstanding share of Christiana Common Stock and .705 share of Du Pont Common Stock for each outstanding share of Christiana 7% Preferred Stock. Both ratios of exchange, we understand, are based upon market values prevailing at May 31, 1972 and are to be adjusted at a later date to reflect changes in market prices.

In response to your request we advise you of our opinion that the foregoing exchange ratios fall within the ranges set forth in our Opinion Letter of July 6, 1972 and that such exchange ratios are fair and reasonable to the Du Pont Company and to Christiana and to the shareholders of the two companies.

Very truly yours,

THE FIRST BOSTON CORPORATION
By /s/ EDWARD TOWNSEND
Edward Townsend
Senior Vice President

DU PONT EXHIBIT NO. 5.
pp. 1-20.

E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898

PROXY STATEMENT
Special Meeting of Stockholders to
Be Held on , 1972

....., 1972

The proxy enclosed herewith is being solicited by order of the Board of Directors of E. I. du Pont de Nemours and Company (hereinafter sometimes referred to as "the Company" or "Du Pont") for use in connection with the special meeting of stockholders to be held on ....., 1972. The expense of printing and mailing proxy material will be included in the expenses discussed under "Merger Expenses" herein. If solicitation other than by mail is made, it is estimated that the expense of such solicitation will be nominal, but no compensation will be paid specifically for such solicitation. The proxy may be revoked by the stockholder at any time prior to its being voted. If the proxy is properly signed and is not revoked by the stockholder, it will be voted at the meeting and the vote will be cast in accordance with the instruction of the stockholder. At the close of business on ....., 1972, the record date for determining the holders of the common stock entitled to vote at the meeting, the Company had ..... shares of common stock outstanding and entitled to vote.

MATTERS TO BE CONSIDERED

The Board of Directors has called this special meeting of stockholders to consider and act upon a proposal,

pursuant to the Delaware General Corporation Law, to adopt the Agreement of Merger providing for the merger of Christiana Securities Company ("Christiana") into Du Pont, including as a part thereof with respect to the surviving corporation, Du Pont, (1) an amendment of the Certificate of Incorporation to increase the authorized common stock of Du Pont from the present 60,000,000 shares of $5 par value per share to 65,000,000 shares of $5 par value per share and (2) a provision for the reduction of capital attributable to shares of Du Pont stock to be acquired from Christiana in the merger and to be retired. The complete terms and conditions of the merger are set forth in the Agreement and Plan of Reorganization ("Plan") between Du Pont and Christiana, both Delaware corporations, which includes the Agreement of Merger. The Plan is attached as Exhibit A.

Summary of Certain Interests

Christiana owns 13,417,120 shares (28.3%) of Du Pont common stock and five of the twenty-six directors of Du Pont are also directors of Christiana. In view thereof, Christiana may be deemed to be in control of Du Pont within the meaning of the Securities Exchange Act of 1934 and the Regulations thereunder. Christiana and Du Pont have consistently denied in prior proxy statements and otherwise that Du Pont is controlled by Christiana. Nevertheless, as described herein under "Merger Negotiations", the terms of the proposed merger were negotiated with a recognition by all participants that it might be considered that Christiana has the potential to exercise a controlling influence over Du Pont, and especial effort was made by Du Pont and Christiana to assure that the terms of the proposed merger would be fair and reasonable for all parties affected.

Christiana is a publicly owned corporation with outstanding capital stock of 11,710,103 shares of common stock ($1.25 par value) and 106,500 shares of 7% cumulative preferred stock ($100 par value). Wilmington Trust Company (the "Bank") and its nominees held of record as of July 31, 1972 an aggregate of 6,575,367 shares of Christiana common stock, or 56.2% of such shares outstanding. Christiana is informed that the Bank held all of these shares in a fiduciary capacity, principally in trust for the benefit of various individuals and institutions, and that the Bank had the right to vote 1,908,686 of such shares (16.3% of the shares outstanding) without consulting any beneficiary or co-fiduciary. Of the eleven members of Christiana's Board of Directors, three are members of the Board of Directors of the Bank as well as the Board of Directors of Du Pont;* three additional Du Pont directors** are members of the Board of Directors of the Bank. In addition, Edward B. du Pont, a director of Christiana and a member of Christiana's special Board committee (see "Merger Negotiations"), is a trust officer of the Bank. Christiana has consistently denied in prior proxy statements and otherwise that Christiana controls, is controlled by, or is under common control with, the Bank, but in view of the matters discussed in this "Summary of Certain Interests", it might be considered that the potential for one or more of such control relationships exists among Christiana, Du Pont and the Bank. In accordance with customary practice of the Bank, members of the Board of Directors of Christiana and Du Pont who serve as directors or officers

* L. du P. Copeland, Irénée du Pont, Jr. and George P. Edmonds. Mr. du Pont is also the President of Christiana and a Senior Vice President of Du Pont.

** W. Sam Carpenter, III, Charles B. McCoy (a member of Du Pont's special Board committee, see "Merger Negotiations") and Hugh R. Sharp, Jr. Mr. McCoy is also President and Chairman of the Board of Du Pont.

of the Bank have taken and will take no part in the determination of the Bank with respect to voting of shares of Christiana stock by the Bank in connection with the merger proposal.

The Merger Terms

The Plan provides for the merger of Christiana into Du Pont, with Du Pont as the surviving corporation. When the merger becomes effective, Du Pont will acquire all of the assets of Christiana and will assume all of the liabilities of Christiana.

The assets of Christiana include 13,417,120 shares (28.3%) of Du Pont common stock, which constitutes about 98% of the market value of Christiana's total assets. In addition, Christiana owns 16,256 shares (1.0%) of Du Pont preferred stock, $4.50 series, 69, 216 shares (3.5%) of Wilmington Trust Company common stock and 7,460 shares (100%) of the common stock of The News-Journal Company, which publishes the two daily newspapers in Wilmington, Delaware. Christiana also has a claim for refund of Federal income taxes. Additional information about the assets and liabilities of Christiana is set forth herein under "Description of Christiana and Du Pont", "Merger Negotiations", "Claim for Tax Refund" and "Disposition of Certain Assets", and in the financial statements of Christiana included in Exhibit C.

Under the Plan, Du Pont will issue, on the effective date of the merger, approximately 13,228,620 shares of its common stock (28.0% of shares outstanding on a pro forma basis after giving effect to the merger). The holders of Christiana common stock will receive all of such shares of Du Pont common stock, except for approximately 78,000 of such shares to be received by the holders of Christiana preferred stock. At the same time, Du Pont will make a

cash payment to the holders of Christiana preferred stock equal to the dividend accrued and unpaid on their stock to the merger date. The holders of Christiana common stock will also receive in the merger any shares of Du Pont common stock distributed, on or prior to the fifth anniversary of the effective date of the merger, in any Contingent Share Distribution, as discussed herein under "Claim for Tax Refund".

The shares of Christiana stock outstanding will be treated in the merger as follows:

(a) Each share of Christiana common stock will be converted into 1.123 shares of Du Pont common stock and, in addition, a pro rata portion of any shares of Du Pont common stock distributed, on or prior to the fifth anniversary of the effective date of the merger, in any Contingent Share Distribution.

(b) Each share of Christiana preferred stock will be converted into such number of shares, or fraction thereof, of Du Pont common stock as is determined by dividing $120 (the redemption price) by the average of the closing prices of Du Pont common stock on the New York Stock Exchange for the ten trading days immediately preceding the effective date of the merger and, in addition, an amount in cash equal to the dividend accrued and unpaid on the preferred stock up to and including the effective date of the merger.

Holders of Du Pont common and preferred stock other than Christiana will continue to hold after the merger the same shares of Du Pont stock they held before the merger.

The 13,417,120 shares of Du Pont common stock and 16,256 shares of Du Pont preferred stock, $4.50 series, held

by Christiana and received by Du Pont in the merger will be retired and restored to the status of authorized and unissued shares. Accordingly, there will be a net reduction of approximately 188,500 in the outstanding shares of Du Pont common stock on the effective date of the merger and, in addition, Du Pont will then own all of the other assets of Christiana and will assume the liabilities of Christiana referred to above. Also, based on pro forma data, annual earnings per share of Du Pont common stock will be increased four cents as a result of the merger.

As discussed herein under "Merger Negotiations" the merger terms were calculated on the basis of Christiana stockholders receiving Du Pont common stock equal in value to 97½% of Christiana's adjusted net asset value. Based on market prices at April 28, 1972, immediately before announcement of merger discussions, Christiana common stockholders would receive, under the merger terms, a per share market value increase of $41.94 in the securities they hold, from $147.00 to $188.94. Christiana preferred stockholders will receive Du Pont common stock with a market price of $120, compared to a market price on April 28, 1972 of $100.

See "Comparative Per Share Data" herein for additional information concerning the effects of the merger.

Increase in Authorized Du Pont Common Stock

In connection with the provision of authorized and unissued shares for issuance in the merger, Du Pont's Certificate of Incorporation will be amended to increase the authorized common stock by 5,000,000 shares to 65,000,000 shares. The approximately 17,742,690 shares of Du Pont common stock authorized and unissued after the merger will be available for issuance by Du Pont for its corporate purposes.

Vote Required; Appraisal Rights

The proposed merger will require the affirmative vote of the holders of a majority of the outstanding shares of Du Pont common stock, and of the holders of a majority of the outstanding shares of Christiana common stock, voting at their respective meetings. The holders of Christiana preferred stock will be accorded statutory appraisal rights, as described herein under "Rights of Christiana Preferred Stockholders Objecting to the Merger".

Conditions to Effectiveness of Merger

Effectiveness of the merger is subject to receipt of satisfactory rulings from the Internal Revenue Service as to certain Federal income tax consequences of the merger, as described herein under "Tax Consequences of Merger", to the effect, among other things, that no gain or loss will be recognized to the holders of Christiana stock, except that the cash received by the Christiana preferred stockholders may be taxable and any portion of the Contingent Share Distribution (see "Claim for Tax Refund") received by the Christiana common stockholders and deemed interest may be taxable. Effectiveness of the merger is also subject to certain other conditions specified in the Plan and summarized herein under "Certain Provisions of the Plan and Agreement of Merger". Upon authorization by the stockholders and satisfaction of the foregoing conditions, the merger will become effective upon the close of business on the day of filing the Agreement of Merger in the office of the Secretary of State of Delaware.

Capitalization of Du Pont

The following table shows the authorized and outstanding stock of Du Pont as of June 30, 1972, before the merger and on a pro forma basis after giving effect to the merger:

	Before Merger	*After Merger*
Preferred Stock		
Authorized shares	4,000,000	4,000,000
Outstanding shares		
$4.50 series (without par value–	1,688,850	1,672,594
$3.50 series cumulative)	700,000	700,000
Common Stock ($5 par value)		
Authorized shares	60,000,000	65,000,000
Outstanding shares*	47,445,810	47,257,310

* Excludes 120,784 shares held in treasury and any shares that may be issued in the Contingent Share Distribution.

The long-term borrowings of Du Pont and consolidated subsidiaries of $215,468,868 at June 30, 1972 will not be affected by the merger.

Description of Christiana and Du Pont

Christiana

Christiana is a closed-end, nondiversified management investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940. Market value of Du Pont common shares held by Christiana represents nearly the entire value of Christiana's total assets and substantially all of Christiana's gross income consists of dividends paid on these Du Pont common shares. Over the years, there has been virtually no turnover in Christiana's portfolio, and Christiana has consistently followed the practice of declaring dividends on its common stock in an amount nearly equal to its net earnings per share of common stock. Expenses of operation are minimal. Security holdings of Christiana, book values thereof and market values thereof used on July 17, 1972 as the basis of the merger terms (approved in principle on that date by the Boards of Directors of Du Pont and Christiana, see "Merger Negotiations") are shown below:

No. of Shares	*Security*	*Book Value Amount*	*Book Value % of Total*	*Market Value Amount*	*Market Value % of Total*
13,417,120	Du Pont, Common	$74,621,915	96.1%	$2,198,730,540 (a)	98.7%
16,256	Du Pont, $4.50 Preferred	1,298,056	1.6	1,124,102 (a)	0.1
69,216	Wilmington Trust Co., Common	903,592	1.2	2,699,424 (b)	0.1
7,460	The News-Journal Co., Common (c)	846,107	1.1	24,260,000 (d)	1.1
	Total	$77,669,670	100.0%	$2,226,814,066	100.0%

(a) Based on $163.875 per share for common and $69.15 per share for preferred, the average closing prices on the New York Stock Exchange on July 10 through 14, 1972, inclusive.

(b) Based on $39.00 per share, the average closing bid price in the over-the-counter market on July 10 through 14, 1972, inclusive.

(c) The News-Journal Company, which is wholly owned, publishes the two daily newspapers in Wilmington, Delaware.

(d) Estimated fair market value based on appraisal by Vincent J. Manno, an expert in the field.

As of September 29, 1972, the market value of the Du Pont common stock held by Christiana aggregated $2,223,887,640 (based on closing price on the New York Stock Exchange on that date), an increase of 1.1% over the market value shown above. This increase reflects the per share market appreciation in Du Pont common stock from $163.875 to $165.75 over the same period. The value of the 1.123 shares of Du Pont common stock to be issued in the merger for each share of Christiana common stock has reflected such change and will continue to reflect any changes in market price for Du Pont common stock.

Du Pont

Du Pont and its subsidiaries are engaged principally in manufacturing and selling diversified lines of chemical

products and other products related thereto. A description of the business and properties of Du Pont and its subsidiaries is shown in Exhibit B.

Reasons for Considering A Merger

A holding of Christiana common stock represents essentially a holding, indirectly, of Du Pont common stock. The common stockholders of Christiana could realize certain advantages by holding their interest in Du Pont directly, in the form of Du Pont common stock, rather than indirectly via ownership of Christiana common stock, as follows:

1. *Market value of the securities held would tend to reflect their full intrinsic value*—Christiana common stock has traditionally traded at a discount compared to the market value of the net assets underlying the Christiana common stock. Over the two years preceding April 28, 1972, the date on which it was announced publicly that a possible merger would be considered, this discount generally was in the range of 20% to 25%—and was 23% on that date. With the Christiana interest in Du Pont held directly by Christiana stockholders via ownership of Du Pont common, this market price discount would be eliminated.

2. *Securities held would be more readily marketable*—Christiana common stock is traded in limited volume in the over-the-counter market. Du Pont common stock has a broad market on the New York Stock Exchange and more limited markets on other exchanges.

3. *Income would be increased*—Dividends paid by Du Pont to Christiana must be reduced by the Federal intercorporate dividend tax (currently at an effective rate of 7.2%) and other (relatively minor) operating expenses of Christiana before they can be passed on by Christiana to the Christiana stockholders.

In order that Christiana common stockholders might realize these advantages, Christiana proposed to Du Pont in April 1972 that a merger of the two companies be considered.

Du Pont agreed to consider such a merger because of the possible advantages to it. Simplification of corporate procedures (e.g., elimination of filing requirements in connection with the Investment Company Act of 1940) would be achieved and there would be a broader market for Du Pont common stock by reason of the dispersion of the large single block of Du Pont common held by Christiana. In addition, considering the potential advantages to Christiana, Du Pont anticipated that it could obtain some financial benefit from the merger, resulting in an improvement of Du Pont earnings per share, to provide Du Pont, overall, sound business reasons for the merger and an attractive proposal to present to its common stockholders for consideration.

Merger Negotiations

The merger negotiations were structured with a view to ensuring, as completely as practicable, that the terms of any agreement to merge would be the result of arm's-length bargaining and free of conflicts of interest. Particular care in this respect was considered necessary not only because Christiana is a major stockholder of Du Pont, but also because five* of the twenty-six Du Pont directors are also directors of Christiana and seven additional Du

* Walter S. Carpenter, Jr., L. du P. Copeland, Irénée du Pont, Jr., George P. Edmonds and Crawford H. Greenewalt.

Pont directors are Christiana stockholders. Moreover, nine of the eleven Christiana directors own Du Pont stock. (Data regarding holdings of Du Pont and Christiana stock by Du Pont directors and Christiana directors are shown in Exhibit E.) These circumstances indicated that especial effort would be desirable to assure that the terms of any agreement to merge would be fair and reasonable for all parties affected, and, accordingly, Du Pont and Christiana proceeded as follows with respect to the merger negotiations:

1. Du Pont and Christiana each appointed a special committee of its Board to negotiate and submit recommendations with respect to the proposed merger. In the case of each company, the special Board committee consisted of two directors with no director, officer or employee relationship with the other company. Christiana appointed to its committee Mr. A. Felix du Pont, Jr., a Vice President and director of Christiana, and Mr. Edward B. du Pont, an Assistant Treasurer and director of Christiana. Du Pont appointed to its committee Mr. Charles B. McCoy, Chairman of the Board and President of Du Pont, and Mr. Irving S. Shapiro, a Senior Vice President and director of Du Pont.

2. The special Board committees engaged investment banking firms as financial advisors to make independent studies and recommendations regarding a suitable range of merger terms. Morgan Stanley & Co., which firm has advised both Christiana and Du Pont on financial matters for a number of years, was engaged to advise Du Pont and Christiana jointly in such respect. Kidder, Peabody & Co. Incorporated was engaged to advise Christiana separately on the matter. The First Boston Corporation was engaged to advise Du Pont separately on the matter.

3. Du Pont directors who also are directors of Christiana, as well as Du Pont directors who own Christiana stock, did not participate in discussion and decision of the Du Pont Board regarding the merger proposal.

The special Board committees of Du Pont and Christiana had discussion with all of the financial advisors regarding the scope of their studies, factors considered, and ranges of merger terms they considered fair and reasonable. The special Board committees each received copies of the reports of each of the financial advisors. Merger negotiations then were undertaken by the special Board committees and resulted in proposed terms of a merger which were approved in principle on July 17, 1972 by the Boards of Directors of Du Pont and Christiana. All Christiana directors present at the meeting (ten of the eleven members of the Board) participated in and voted on the matter, including the five who are also directors of Du Pont.

The proposed merger terms reflect agreement that the value of Christiana's net assets for purposes of the merger should be as follows:

Net Asset Value of Christiana:	
Security holdings (as shown herein under "Description of Christiana and Du Pont")	$2,226,814,066
Other assets (as of June 30, 1972):	
Cash and cash equivalents, less current liabilities	5,981,367
Deferred charge—claim for tax refund	11,723,013
Total Net Asset Value of Christiana	2,244,518,446
Less Adjustments:	
Adjustments discussed herein under "Claim for Tax Refund"	(12,723,013)
Adjustments discussed herein under "Disposition of Certain Assets"	(7,619,606)
Adjustments discussed herein under "Merger Expenses"	(750,000)
Adjusted Net Asset Value of Christiana	$2,223,425,827

The proposed merger terms are such as to provide Christiana stockholders shares of Du Pont common stock with market value equal to 97½% of Christiana's adjusted net asset value in exchange for their Christiana shares. While this reflects a 2½% discount from Christiana's adjusted net asset value for purposes of the merger, the effective net discount to be borne by Christiana stockholders will be only 1.8% as indicated below.

	Amount (dollars in millions)	*% of Adjusted Net Asset Value*
Discount reflected in merger terms	$55.6	2.5%
Portion of discount that will be applicable to the Du Pont shares issued to Christiana stockholders, which portion, accordingly, will be recaptured by such Christiana stockholders	15.6	.7
Effective net discount	$40.0	1.8%

The $55.6 million discount reflected in the merger terms is equivalent to $1.18 per share of Du Pont common stock outstanding, based on the 47,257,310 shares outstanding (excluding shares held in treasury) at June 30, 1972, after giving effect to the merger.

When the merger becomes effective, each share of Christiana preferred stock will be converted into Du Pont common stock having a then market value of $120 and, in addition, an amount in cash equal to the dividend accrued and unpaid. Each share of Christiana common stock will be converted into 1.123 shares of Du Pont common stock and, in addition, a pro rata portion of any shares of Du Pont common stock distributed in any Contingent Share Distribution, as discussed herein under "Claim for Tax Refund". The 1.123 conversion ratio for Christiana common stock was calculated as follows:

Adjusted net asset value of Christiana (see above)	$2,223,425,827
Less—discount @ 2½%	55,585,646
Value of Christiana for purposes of the merger	2,167,840,181
Less—portion applicable to Christiana preferred stock (106,500 shares @ $120 a share)	12,780,000
Value of Christiana applicable to Christiana common stock	2,155,060,181
Number of Du Pont common shares with equivalent value, at $163.875 a share (see "Description of Christiana and Du Pont")	13,150,634
Number of shares of Christiana common stock outstanding	11,710,103
Number of Du Pont common shares into which each Christiana common share will be converted	1.123

The proposed merger terms fall within the range recommended by each of the three financial advisors and each such advisor has stated that in its opinion the proposed terms are fair and reasonable.

Financial Statements

When the merger becomes effective, the assets and liabilities of Christiana will be recorded on the books of Du Pont, the surviving corporation, using the purchase method of accounting. Financial statements of Du Pont and Christiana are shown in Exhibit C.

The following Pro Forma Combined Statement of Income and condensed Pro Forma Combined Balance Sheet, both unaudited, for Du Pont and Christiana give effect to the proposed merger on the basis of the terms described in this Proxy Statement but without reflecting the effect of any Contingent Share Distribution. The Pro Forma Combined Statement of Income gives retroactive effect to the proposed merger through elimination of the effect of intercompany transactions (i.e., Du Pont dividends received by Christiana and related taxes) and dividends paid by Christiana but without reflecting expenses of the merger. The pro forma combined financial statements should be read in conjunction with the financial statements of Du Pont and Christiana set forth in Exhibit C.

Pro Forma Combined Statement of Income
(Dollars in millions, except per share)

	Six Months Ended June 30, 1972	*Year Ended December 31, 1971*
Net Sales	$2,160.1	$3,848.2
Other Income	32.1	64.4
Total	2,192.2	3,912.6
Less:		
Cost of Goods Sold and Other Operating Charges	1,353.7	2,429.9
Selling, General and Administrative Expenses	224.6	430.5
Provision for:		
Depreciation and Obsolescence	196.4	373.1
"B" Bonus (amounts tentatively available for credit, or credited, to the Fund)	23.9	34.6
Interest on Borrowings	9.4	14.8
Total	1,808.0	3,282.9
Earnings Before Taxes on Income	384.2	629.7
Less: Provision for Taxes on Income	170.7	272.8
Net Income	213.5	356.9
Dividends on Preferred Stock	5.0	10.0
Amount Earned on Common Stock	$ 208.5	$ 346.9
Earnings per Share of Common Stock	$ 4.41	$ 7.37
Book Value per Share of Common Stock	$ 63.11	
Actual Du Pont Earnings per Share of Common Stock	$ 4.39	$ 7.33

PRO FORMA COMBINED BALANCE SHEET
At June 30, 1972
(Dollars in millions)

ASSETS

	Du Pont	*Christiana*	*Pro Forma Adjustments*	*Pro Forma Combined*
CURRENT ASSETS	$1,745.2	$ 6.3		$1,751.5
PLANTS AND PROPERTIES, Net of Accumulated Depreciation and Obsolescence	2,047.5			2,047.5
OTHER ASSETS				
Du Pont	301.5			301.5
Christiana:				
Investment in—				
Du Pont Common and Preferred		75.9	$(75.9)(a)	
Wilmington Trust Company and The News-Journal Company		1.8	17.5 (b)	19.3
Deferred Charge		11.7	(11.7)(c)	
Total Other Assets	301.5	89.4	(70.1)	320.8
TOTAL	$4,094.2	$95.7	$(70.1)	$4,119.8
LIABILITIES				
CURRENT LIABILITIES	$ 493.6	$ .3	$ 2.5 (d)	$ 496.4
LONG-TERM BORROWINGS	215.5			215.5
OTHER LIABILITIES	180.4			180.4
STOCKHOLDERS' EQUITY				
Preferred Stock—$3.50 and $4.50 Series	238.9		(1.6)(a)	237.3
Preferred Stock—7%		10.7	(10.7)	
Common Stock—$5 par value	237.8		(.9)(a)	236.9
Common Stock—$1.25 par value		14.6	(14.6)	
Amount Paid-in, In Excess of Par or Stated Value	215.2		25.3 (e)	240.5
Reinvested Earnings	2,512.8	70.1	(70.1)	2,512.8
Total Stockholders' Equity	3,204.7	95.4	(72.6)	3,227.5
TOTAL	$4,094.2	$95.7	$(70.1)	$4,119.8

(a) Reflects retirement of 13,417,120 shares of Du Pont common stock and 16,256 shares of Du Pont $4.50 preferred stock, all of which are presently owned by Christiana. "Common Stock—$5 par value" also reflects issuance of an estimated 13,228,620 shares of Du Pont common stock.

(b) Investments in Wilmington Trust Company and The News-Journal Company have been adjusted to their quoted market and appraised values, respectively, less Du Pont's estimated costs of disposition of these investments as discussed herein under "Disposition of Certain Assets".

(c) Adjustment to reflect claim for tax refund at no value for purposes of the proposed merger as described herein under "Claim for Tax Refund".

(d) To establish reserves of $1.0 representing provision for expenses to pursue Christiana tax claim and $1.5 representing provision for estimated merger expenses.

(e) Reflects (1) the estimated fair value of Christiana's net assets excluding Du Pont common and preferred stock plus (2) stated value of shares of Du Pont preferred stock retired as a result of the merger and par value of the excess of the number of shares of Du Pont common stock retired as a result of the merger over the number of shares of Du Pont common stock estimated to be issued as a result of the merger, reduced by (3) DuPont's estimated merger expenses.

Comparative Per Share Data

The following tabulation sets forth certain actual and pro forma (after giving effect to the merger) per share net earnings, dividend and market value data for Du Pont and Christiana for the periods and dates indicated. The per share data are based on the actual and pro forma financial statements appearing elsewhere in this Proxy Statement and this tabulation should be read in conjunction therewith:

	Six Months Ended June 30, 1972	*Year Ended December 31, 1971*
Du Pont Common Stock		
Net earnings per share:		
Actual	$ 4.39	$ 7.33
Pro forma	4.41	7.37
Dividends per share:		
Actual	$ 2.50	$ 5.00
Christiana Preferred Stock		
Dividends per share:		
Actual	$ 3.50	$ 7.00
Pro forma (a)	1.83	3.66
Market value per share at end of period:		
Actual	$100.00	$100.00
Pro forma	120.00	120.00
Christiana Common Stock		
Net earnings per share:		
Actual	$ 2.64	$ 5.28
Actual, adjusted to equity method of accounting (b)	4.66	7.76
Pro forma (c)	4.95	8.28
Dividends per share:		
Actual	$ 2.50	$ 5.25
Pro forma (c)	2.81	5.62
	April 28, 1972 (e)	*July 17, 1972 (f)*
Market Value Per Share: (d)		
Market value of 1.123 shares of Du Pont common stock to be exchanged for each share of Christiana common stock	$188.94	$184.73(g)
Market value of a share of Christiana common stock	147.00	167.50
Increase in market value:		
Amount	$ 41.94	$ 17.23
Percent	28.5%	10.3%

(a) Reflects an estimated exchange ratio of .7323 shares of Du Pont common stock for each share of Christiana preferred stock (based on average closing price for Du Pont common on the New York Stock Exchange for the five trading days preceding July 17, 1972). The basis for the actual exchange ratio is described herein under "Matters To Be Considered".

(b) Christiana's actual net earnings adjusted to include equity in the undistributed earnings of Du Pont and The News-Journal Company.

(c) Reflects an exchange ratio of 1.123 shares of Du Pont common stock for each share of Christiana common stock as described herein under "Merger Negotiations".

(d) Based on closing market price for Du Pont common stock on the New York Stock Exchange and closing bid price for Christiana common stock in the over-the-counter market on the respective dates.

(e) Announcement was made on this date, after the close of trading on the New York Stock Exchange, that merger discussions would be undertaken.

(f) On this date, the proposed merger was approved in principle by the Boards of Directors of Du Pont and Christiana and the merger terms were publicly announced after the close of trading on the New York Stock Exchange.

(g) The adjusted net asset value of Christiana common stock for purposes of the merger determined as set forth herein under "Merger Negotiations" was $188.78 per share.

MARKET PRICES OF SECURITIES.

The following tabulations set forth the high and low market prices of Du Pont common stock, on the New York Stock Exchange, as reported by the *Commercial and Financial Chronicle,* and the range of quoted bid and asked prices for Christiana common stock and preferred stock in the over-the-counter market, as furnished by National Quotation Bureau, Inc.

Du Pont	*Common Stock*	
	High	*Low*
1970:		
1st Quarter	$108.75	$ 92.50
2nd Quarter	121.50	97.13
3rd Quarter	128.00	111.00
4th Quarter	134.25	114.00
1971:		
1st Quarter	148.00	129.50
2nd Quarter	152.00	134.75
3rd Quarter	158.00	139.50
4th Quarter	157.25	133.38
1972:		
1st Quarter	175.50	144.25
2nd Quarter	176.50	159.13
3rd Quarter	184.38	160.00
Closing price		
April 28 (a)	168.25	
July 17 (b)	164.50	
September 29 (c)	165.75	

Christiana	Common Stock				Preferred Stock			
	Bid		Asked		Bid		Asked	
1970:	High	Low	High	Low	High	Low	High	Low
1st Quarter	$ 99.00	$ 85.00	$103.00	$ 88.00	$ 99.00	$ 94.00	$103.00	$ 97.00
2nd Quarter	107.00	90.00	109.00	93.00	99.00	88.00	104.00	91.00
3rd Quarter	112.00	100.00	115.00	103.00	96.00	88.00	100.00	91.00
4th Quarter	113.00	101.00	117.00	104.00	99.00	95.00	102.00	98.00
1971:								
1st Quarter	129.50	112.00	131.00	114.00	106.00	97.00	109.00	100.00
2nd Quarter	129.00	120.00	138.00	123.00	106.00	95.00	110.00	99.00
3rd Quarter	141.50	122.50	143.50	124.50	100.00	94.00	105.00	100.00
4th Quarter	136.00	116.00	138.00	118.00	100.00	97.00	104.00	102.00
1972:								
1st Quarter	142.00	120.00	145.00	123.00	99.00	98.00	104.00	101.25
2nd Quarter	166.50	140.00	173.00	143.00	102.00	97.00	106.00	102.00
3rd Quarter	195.50	160.00	205.50	165.50	106.00	100.00	none	none
Closing bid price (d)								
April 28 (a) ...	147.00				100.00			
July 17 (b) ...	167.50				100.00			
September 29 (c)	176.00				100.00			

(a) Announcement was made on this date, after the close of trading on the New York Stock Exchange, that merger discussions would be undertaken.

(b) On this date, the proposed merger was approved in principle by the Boards of Directors of Du Pont and Christiana and the merger terms were publicly announced after the close of trading on the New York Stock Exchange.

(c) Latest practicable date prior to issuance of th is Proxy Statement.

(d) Closing bid prices of Christiana common stock are as reported in *The Wall Street Journal*, and of Christiana preferred stock are as reported in *The Mor ning News*, Wilmington, Delaware.

INVESTMENT COMPANY ACT OF 1940

The Investment Company Act of 1940 ("Act") contains comprehensive provisions regulating such matters as the capital structure, management and operations of companies primarily engaged in investing, holding or trading in securities. The Act prohibits a merger transaction between a registered investment company, such as Christiana, and an affiliated person of that registered investment company, such as Du Pont, unless upon application the Securities and Exchange Commission ("Commission") has granted an order exempting the merger transaction from the provisions of the Act. Christiana and Du Pont filed with the Commission a joint application which contained financial data including copies of the reports of the financial advisors, requesting such an exemption order. A copy of the notice of the Commission dated October 3, 1972 with respect to the requested exemption order was mailed promptly after such date to each stockholder of Du Pont and Christiana. On , 1972 the Commission granted the requested order of exemption in which it found, pursuant to the Act, that the terms of the proposed plan of merger are reasonable and fair and do not involve overreaching on the part of any person concerned.

On the effective date of the merger, Christiana's corporate existence will cease; accordingly, Christiana has requested an order of the Commission terminating Christiana's registration as an investment company to be issued upon satisfactory demonstration to the Commission that all business activity pertaining to Christiana has been concluded and that a majority of Christiana's voting securities has approved a change in Christiana's business so as to cease to be an investment company. As long as Christiana continues to be a registered investment company, the Act and the Commission's broad regulatory powers thereunder

will apply. However, as stockholders of Du Pont following consummation of the merger, former Christiana shareholders will not be afforded the protection of the Act.

Approval of the Agreement of Merger by the stockholders of Christiana will include as a part thereof approval of termination of Christiana's business as an investment company. The Board of Directors of Christiana has determined that, in its opinion, the advantages of the merger outweigh any possible disadvantages resulting from termination of Christiana's status as a registered investment company.

Recommendation of the Board of Directors

The Board of Directors of Du Pont, with the twelve directors who also are directors of Christiana or who own Christiana stock not participating, considered the merger proposal and is of the opinion that the proposed merger is desirable and that the terms of the merger are fair and reasonable. *The Board of Directors, as so constituted and with the fourteen participating directors voting unanimously, approved the Agreement of Merger and recommends that you vote "FOR" adoption of the Agreement of Merger by voting in favor of the following resolution which will be presented at the meeting:*

> Resolved, that the Agreement of Merger providing for the merger of Christiana Securities Company into E. I du Pont de Nemours and Company as approved on , 1972 by the Board of Directors subject to the approval of stockholders, and as set forth in the copy of the Agreement of Merger appended to the proxy statement mailed in connection with this meeting, including the provision therein for the increase in authorized common stock and for the reduction of capital, hereby is approved and adopted.

Christiana has advised Du Pont that it presently intends to vote the shares of Du Pont common stock owned by Christiana in favor of the foregoing resolution, and Wilmington Trust Company has advised Christiana that [to be completed with any information received as to the voting intent of the Bank].

The Board of Directors of Christiana is recommending to its stockholders that they vote in favor of the adoption of the Agreement of Merger at a special meeting of Christiana stockholders to be held , 1972.

Claim for Tax Refund

Christiana filed suit in the United States District Court in Wilmington, Delaware on December 23, 1969 for the refund of a substantial amount of Federal income taxes and interest. A deferred charge relating to this claim for tax refund is carried on its books by Christiana in the amount of $11,723,013. The claim for tax refund, amounting to approximately $21 million, plus statutory interest thereon, principally involves a controversy as to the fair market value for Federal income tax purposes of the very large blocks of General Motors common stock received by Christiana in 1962, 1964 and 1965 as a result of the General Motors divestiture distribution by Du Pont. Counsel for the Federal government and for Christiana have discussed the possibility of settlement of this tax claim. Christiana has made an offer of settlement for refund of approximately $9 million to Christiana, but no such settlement has been approved or currently appears to be in prospect.

Christiana and Du Pont know of no reasonable method to determine at this time the fair value of Christiana's tax claim, because there is no way of predicting the amount, if any, that will ultimately be recovered

with respect thereto. Therefore, the merger terms contemplate that the tax claim, together with $1,000,000 of Christiana's cash to be reserved to cover expenses to pursue the claim, will be treated at the time of the merger as having no value. Accordingly, in determining the adjusted net asset value of Christiana for purpose of the merger, Christiana's net asset value was reduced as follows with respect to the claim for tax refund:

Amount carried on Christiana books as a deferred charge with respect to the tax claim	$11,723,013
Cash reserved for tax claim expenses	1,000,000
Total	$12,723,013

The tax claim and related cash reserved for expenses will become the property of Du Pont on the effective date of the merger, but a Tax Claim Committee, consisting of the present directors of Christiana and successors thereof elected by those remaining in office to fill any vacancies, will be established to manage, with assistance of counsel and on behalf of the former Christiana common stockholders, matters pertaining to pursuit of the tax claim. Du Pont will not participate in decisions regarding litigation or other developments with respect to the tax claim. The Tax Claim Committee will have complete responsibility for all decisions concerning the settlement or prosecution of the tax claim.

Du Pont will use the funds reserved for expenses for payment of expenses incurred by the Tax Claim Committee. Upon settlement of the tax claim, any residue of such funds, together with funds equivalent to net proceeds from settlement of the tax claim, including certain tax benefits to Du Pont and subject to certain limits specified in the Agreement of Merger, will be used to determine a

number of shares of Du Pont common stock having corresponding value and such shares will be delivered to an agent appointed for the purpose. The agent will distribute these additional shares of Du Pont common stock (Contingent Share Distribution) to the former Christiana common stockholders in proportion to the Du Pont common stock received by them on the effective date of the merger. The price for Du Pont common stock to be used for the foregoing determination will be the average of the closing prices for Du Pont common stock on the New York Stock Exchange for the ten trading days preceding the date on which refund payment by the Government is received by Du Pont or, if no refund is to be received, the date on which judgment to that effect becomes final. In the latter event, only a residue of the funds reserved for expenses could be available for distribution.

If the tax claim is not settled on or before the 150th day preceding the fifth anniversay of the effective date, Du Pont will negotiate in good faith with the Tax Claim Committee to determine the fair value of the tax claim at such time. In the event that Du Pont and the Tax Claim Committee are unable to agree on an amount before the 120th day preceding the fifth anniversary of the effective date, each will promptly deliver a notice to the other designating one appraiser. The two appraisers so designated will, in turn, select a third appraiser who will serve as chairman. If the designated appraisers cannot agree upon the third appraiser, the American Arbitration Association will be requested to appoint a third appraiser. No later than the tenth business day preceding the fifth anniversary of the effective date, the appraisers will deliver to Du Pont and the Tax Claim Committee a statement specifying the then fair value of the tax claim. The decision of a majority of such appraisers will be final unless a majority

are unable to agree, in which event the determination of the chairman will govern. When agreement as to the fair value of the tax claim is reached between Du Pont and the Tax Claim Committee or, in the absence of such agreement, the fair value is determined by the appraisers, a distribution of additional Du Pont common shares based thereon will be made.

If the Contingent Share Distribution is made more than one year after the effective date of the merger, a portion of such Contingent Share Distribution will be treated as interest paid with respect to the remainder of the distribution.

Disposition of Certain Assets

In the merger, Du Pont will acquire from Christiana 69,216 shares (3.5%) of the Wilmington Trust Company common stock and all the outstanding stock of The News-Journal Company. Wilmington Trust Company is the trustee for the Du Pont pension fund and the Du Pont thrift plan and, in any event, Du Pont has no interest in maintaining an investment in bank stock. The News-Journal Company publishes the only daily newspapers in Wilmington, Delaware, Du Pont's headquarters city. Du Pont intends to hold these two investments for only the period required for orderly disposition thereof.

In determining the adjusted net asset value of Christiana for purposes of the merger, Christiana's net asset value was reduced to reflect anticipated expenses of disposal of the Wilmington Trust Company stock (estimated to amount to 3% of market value) and tax of 30% on the capital gains that would result from sale of the stock of the Wilmington Trust Company and The News-Journal Company at the values reflected for such assets for purposes of the merger. Adjustments made for this purpose are summarized below:

Estimated expenses of disposal of Wilmington Trust Company stock	$ 80,983
Estimated capital gains tax upon sale of—	
Wilmington Trust Company stock	514,455
The News-Journal Company stock	7,024,168
Total	$7,619,606

Merger Expenses

Christiana and Du Pont will incur certain expenses in connection with the proposed merger, consisting principally of fees of the financial advisors and legal counsel and printing and mailing expenses, estimated to total $1,500,000. The special Board committees agreed that it would be equitable for Christiana and Du Pont to share the total estimated merger expenses equally. Accordingly, in determining the adjusted net asset value of Christiana for purposes of the merger, Christiana's net asset value was reduced $750,000 with respect to merger expenses.

Retirement of Shares and Effect on Capital

Approval of the Agreement of Merger by stockholders of Du Pont will include as part thereof approval of a reduction of the capital of Du Pont. Article Fifth, paragraph (e), of the Agreement of Merger provides for the retirement and restoration to the status of authorized and unissued shares of the preferred and common stock of Du Pont held by Christiana on the effective date and received by Du Pont in the merger, and that the capital of Du Pont shall be automatically reduced by the aggregate amount of capital attributable on the effective date to (1) the shares of preferred stock then retired, at the stated value thereof, and (2) the shares of common stock then retired, at par value thereof; the reduction of capital to have the same force and effect as if separately submitted to the

stockholders pursuant to Section 244 of the Delaware General Corporation Law. The reduction in compliance with Delaware law is necessary to fully reflect the retirement of the Du Pont stock acquired from Christiana in the merger. A certificate of reduction of capital in accordance with Delaware law will be filed with the Secretary of State of Delaware as soon as practicable after the merger becomes effective.

Apart from the 13,417,120 shares of Du Pont common stock and 16,256 shares of Du Pont preferred stock, $4.50 series, which will be retired by reason of the merger, approximatey 13,228,620 shares of authorized and unissued Du Pont common stock will be issued to holders of Christiana capital stock. Accordingly, the merger will result in approximately 188,500 fewer shares of Du Pont common stock being outstanding, exclusive of any shares of Du Pont common stock that may be distributed in any Contingent Share Distribution.

Tax Consequences of Merger

An application has been submitted to the Internal Revenue Service jointly by Du Pont and Christiana requesting rulings as to certain Federal income tax consequences of the merger. Du Pont and Christiana do not intend to make the merger effective unless satisfactory rulings from the Internal Revenue Service are received. Such rulings shall be deemed satisfactory to Du Pont and Christiana if they provide that:

(a) No gain or loss will be recognized to Christiana upon the transfer of its assets to and the assumption of its liabilities by Du Pont pursuant to the Plan, and no gain or loss will be recognized to Christiana upon the distribution of Du Pont common stock and

cash to the shareholders of Christiana pursuant to the Plan;

(b) No gain or loss will be recognized to Du Pont upon the issuance of its common stock pursuant to the Plan;

(c) The basis to Du Pont of the assets acquired from Christiana pursuant to the Plan will be the same as the basis of such assets to Christiana immediately before the effective date of the merger;

(d) The holding period to Du Pont of the assets acquired from Christiana pursuant to the Plan will include the holding period of such assets to Christiana;

(e) No gain or loss will be recognized to the holders of Christiana preferred stock upon the conversion of such stock in accordance with the Plan, except that such ruling shall be deemed to be satisfactory notwithstanding that it states that the cash received by such holders will be taxable to them as capital gain or ordinary income;

(f) No gain or loss will be recognized to the holders of Christiana common stock upon the conversion of such stock into Du Pont common stock, including stock, if any, received in the Contingent Share Distribution but excluding any such stock treated as interest;

(g) The basis of the Du Pont common stock (except for any portion of the Contingent Share Distribution treated as interest) received by the holders of the Christiana preferred stock and of the Christiana common stock will be the same as the basis of the Christiana preferred stock or common stock converted

thereinto, except that such ruling shall be deemed to be satisfactory notwithstanding that it states or indicates that adjustments are to be made (1) for the cash received by the holders of the Christiana preferred stock, (2) for the stockholder's interest in, and for the receipt of, the Contingent Share Distribution in the case of the holders of the Christiana common stock, and (3) for the gain, if any, recognized to the holders of the Christiana preferred stock; and

(h) The holding period of the Du Pont common stock (except for any portion of the Contingent Share Distribution treated as interest) received by the stockholders of Christiana will include the period during which the stock converted thereinto was held, provided that the stock so converted was a capital asset in the hands of the respective stockholder.

Counsel to Du Pont has advised that the consummation of the merger will have no Federal income tax consequences to Du Pont stockholders in their status as such.

Counsel to Christiana has advised that gain or loss will be recognized to Christiana common and preferred stockholders who sell fractional share interests in Du Pont common stock.

Counsel to Christiana has advised that a Christiana preferred stockholder who exercises his statutory right of appraisal as described herein under "Rights of Christiana Preferred Stockholders Objecting to the Merger" will recognize gain or loss for Federal income tax purposes measured by the difference between the amount received by him for his Christiana preferred stock and his basis for such stock, except that under certain circumstances the entire amount received by such stockholder may be taxable as ordinary income. The Federal income tax consequences to each dissenting stockholder may depend upon (a) the number of shares and classes of Du Pont stock held by such stockholder prior to the merger, (b) the number of shares of Christiana common stock owned if such dissenting stockholder owns both Christiana preferred and common stock, and (c) the number of shares and classes of Christiana and Du Pont stock held by certain related individuals or entities referred to below (and, in the case of any such related Christiana preferred stockholders, whether or not such related stockholders dissent). For this purpose, a dissenting Christiana stockholder may be treated as owning stock of Christiana or Du Pont held by certain related individuals, estates, trusts, partnerships and corporations, or stock of Christiana or Du Pont which he has an option to acquire, pursuant to the rules set forth in Section 318(a) of the Internal Revenue Code and Regulations thereunder. Christiana preferred stockholders who propose to exercise their statutory rights of appraisal are urged to consult their own tax counsel with respect to their particular situations.

Because of the complexities of the tax consequences of the merger, Christiana stockholders are urged to consult their own tax counsel with respect to their particular situations under Federal and any applicable state or local income tax laws.

Information Concerning Directors

The Agreement of Merger provides that Du Pont shall be the surviving corporation and that the Board of Directors of Du Pont on the effective date of the merger shall remain such until their respective successors are duly elected and qualified. The following tabulation sets forth the directors of Du Pont, their principal occupation and the date each was elected a director of Du Pont.

Name and Principal Occupation	*Director Since*
WALTER J. BEADLE, retired, former Vice President and member of Executive Committee	1946
WALTER S. CARPENTER, JR., retired, Honorary and former Chairman of Board of Directors and former President*	1919
W. SAM CARPENTER, III, retired; member of Finance Committee	1967
LAMMOT DU P. COPELAND, retired, former Chairman of Board of Directors and President; member of Finance Committee*	1942
JOSEPH A. DALLAS, Senior Vice President, member of Executive Committee of DuPont; Director of Remington Arms Company, Inc.; Director of Du Pont of Canada Limited	1968
DAVID H. DAWSON, Senior Vice President, member of Executive Committee of Du Pont; Director of Remington Arms Company, Inc.	1955
EMILE F. DU PONT, retired; member of Finance Committee and Bonus and Salary Committee	1944
IRÉNÉE DU PONT, JR., Senior Vice President, member of Executive Committee*	1959
GEORGE P. EDMONDS, retired, Honorary and former Chairman of Board of Directors of Wilmington Trust Company, Wilmington, Delaware; member of Finance Committee of Du Pont*	1966
EDWIN A. GEE, Senior Viee President, member of Executive Committee	1969
WALLACE E. GORDON, retired, former Vice President and member of Executive Committee	1965
CRAWFORD H. GREENEWALT, Chairman of Finance Committee; retired, former Chairman of Board of Directors and President*	1942
CARYL P. HASKINS, retired, former President of Carnegie Institution of Washington and Research Director of Haskins Laboratories, Inc.	1971

* Also a director of Christiana.

Name and Principal Occupation	*Director Since*
ROBERT L. HERSHEY, member of Committee on Audit and Bonus and Salary Committee; retired, former Vice President and member of Executive Committee	1958
GEORGE E. HOLBROOK, member of Finance Committee and Bonus and Salary Committee; retired former Vice President and member of Executive Committee	1958
HOWARD W. JOHNSON, Chairman of Massachusetts Institute of Technology Corporation; member of Bonus and Salary Committee of Du Pont	1972
EDWARD R. KANE, Senior Vice President, Vice Chairman of Executive Committee, member of Finance Committee	1969
WM. WINDER LAIRD, civic leader, philanthropist; member of Committee on Audit	1965
SAMUEL LENHER, retired, former Vice President and member of Executive Committee	1955
CHARLES B. MCCOY, Chairman of Board of Directors and President; Chairman of Executive Committee and member of Finance Committee	1961
BERNARD PEYTON, retired, former Chairman of Board of Directors of New York Air Brake Company	1955
R. RUSSELL PIPPIN, Chairman of Committee on Audit; retired, former Vice President and member of Executive and Finance Committees	1964
ROBERT L. RICHARDS, Chairman of Bonus and Salary Committee and member of Committee on Audit; retired, former Vice President and member of Executive Committee	1954
IRVING S. SHAPIRO, Senior Vice President, member of Executive Committee	1970
HUGH R. SHARP, JR., member of Finance Committee and Bonus and Salary Committee	1952
LESTER S. SINNESS, Senior Vice President, member of Executive Committee of Du Pont; Director of Du Pont of Canada Limited	1963

* Also a director of Christiana.

None of the directors of Christiana received any remuneration from Christiana during 1971 and no director or officer of Christiana who was not also a director or employee of Du Pont received any remuneration from Du Pont and its subsidiaries during 1971.

Exhibit E shows remuneration for the year 1971 to directors of Du Pont, including the three highest-paid officers, who received more than $30,000 from Du Pont and its subsidiaries and to all directors and officers as a group. Exhibit E also shows shares of Du Pont and Christiana stock owned beneficially, directly or indirectly, by each of the directors of Du Pont and Christiana as of September 30, 1972.

Affiliates of Christiana

The directors of Christiana and certain other stockholders of Christiana may be deemed within the meaning of the Securities Act of 1933 and Regulations thereunder to be "affiliates" of Christiana. As a result, such persons will be restricted by the Securities Act of 1933 with respect to disposition of shares of Du Pont common stock received by them in the merger. Du Pont has agreed as to such persons that upon their request, subject to specified limitations and certain conditions regarding indemnification, expenses and other matters, Du Pont will register such shares pursuant to the Securities Act of 1933 to permit public sale thereof.

In the light of the matters discussed under "Summary of Certain Interests", Du Pont has determined that it will treat Wilmington Trust Company as restricted with respect to disposition of certain of the shares of Du Pont common stock the Bank receives in the merger and will afford registration rights with respect to such shares.

Procedure for Exchange of Stock Certificates by Christiana Stockholders and Settlement of Fractional Share Interests

Du Pont stockholders, other than Christiana, will retain their present certificates for Du Pont stock.

Exchange of Certificates

Promptly after the effective date of the merger, holders of Christiana stock will receive instructions as to the procedure to be followed in surrendering certificates representing converted Christiana stock for Du Pont common stock certificates. Holders of Christiana stock certificates will be entitled, upon surrender of such certificates, to receive in exchange therefor certificates representing the appropriate number of whole shares of Du Pont common stock. Until so surrendered, each outstanding certificate (which prior to the merger represented shares of Christiana common or preferred stock) will be deemed, for all corporate purposes other than the payment of dividends, to evidence ownership of the appropriate number of shares of Du Pont common stock. No dividend payable to the holders of record shares of Du Pont common stock as of any date subsequent to the effective date of the merger will be paid to the holders of outstanding certificates representing converted Christiana common or preferred stock. Upon surrender of a Christiana certificate there will be paid to the record holder of the certificate for shares of Du Pont common stock issued in exchange therefor the amount of dividends (without interest) which previously became payable with respect to the Du Pont common stock represented by the certificate so issued.

No document will be issued to Christiana common stockholders evidencing the possible additional shares of Du Pont common stock distributable upon settlement of

Christiana's tax claim, and the interest therein is not assignable except by will or by operation of law.

Fractional Share Interests

No certificates for fractional shares of Du Pont common stock will be issued in connection with the conversion of Christiana stock. In lieu thereof, each Christiana shareholder entitled to a fractional interest in a share of Du Pont common stock will be afforded an opportunity, through [name of agent], Order Form Agent, either (1) to purchase the additional fractional interest required to make up one full share, or (2) to sell the fractional interest to which he is entitled. Stockholders entitled to fractional interests will be furnished order forms on which they may instruct the Order Form Agent on or before the 40th day following the effective date of the merger, to buy or sell fractional interests for their individual accounts. All shares held to cover fractional interests with respect to which the Order Form Agent does not receive completed order forms from the holders thereof before the close of business on such day will be sold in due course for the account of such holders.

The same procedure shall be utilized for the treatment of fractional interests arising out of any Contingent Share Distribution.

Description of Du Pont Capital Stock

The following is a summary of certain provisions and rights of holders of the capital stock of Du Pont, the surviving corporation.

Preferred Stock—(without par value—cumulative)

Dividend Rights. Holders of the Du Pont preferred stock, $4.50 series and $3.50 series, are entitled

to receive cumulative dividends declared and set apart for payment before payment of dividends on the Du Pont common stock, at the annual rates of $4.50 a share and $3.50 a share, respectively, payable quarterly on the 25th day of January, April, July and October.

Voting Rights. Holders of Du Pont preferred stock have no voting rights except as expressly provided by law, and except that in the event Du Pont shall be in default in the payment of dividends on the preferred stock for a period of six months, then until such dividends in default have been paid, the holders of preferred stock shall have the exclusive right, voting separately and as a class, to elect two directors at each meeting of the Du Pont stockholders held for the purpose of electing directors.

Liquidation Rights. In the event of any liquidation or dissolution or winding-up of Du Pont, holders of the preferred stock shall be entitled to be paid $100 a share and accumulated dividends upon an involuntary liquidation, and upon voluntary liquidation $115 a share and accumulated dividends for the $4.50 series and $107 a share and accumulated dividends for the $3.50 series.

Pre-emptive Rights. No holder of any shares of Du Pont preferred stock shall have any pre-emptive or preferential right of subscription to any shares of Du Pont stock of any class, or to any obligations convertible into shares of Du Pont stock of any class, issued or sold, nor any right of subscription to any thereof other than such, if any, as the Board of Directors in its discretion from time to time may determine.

Redemption Provisions. The Du Pont preferred stock of any series is subject to redemption in whole or in part at any time upon not less than sixty days' notice at the following prices:

$4.50 series—At $120 a share and accumulated dividends.

$3.50 series—At $102 a share and accumulated dividends.

Rank. All series of Du Pont preferred stock rank equally and are identical in all respects, except as noted above.

Common Stock—($5 par value)

Dividend Rights. Subject to the rights of the Du Pont preferred stock, holders of the Du Pont common stock are entitled to receive such dividends as the Board of Directors may declare from surplus or net earnings.

Voting Rights. Holders of the Du Pont common stock have the right to vote on all questions to the exclusion of all other stockholders, except as otherwise expressly provided by law, and except as set forth above under "Preferred Stock".

Liquidation Rights. Upon any liquidation or dissolution or winding-up of Du Pont, whether voluntary or involuntary, after payments have been made to holders of the Du Pont preferred stock, the holders of Du Pont common stock are entitled to share pro rata in the remaining assets available for distribution.

Pre-emptive Rights. Holders of Du Pont common stock have the pre-emptive right to subscribe to additional common stock except shares issued directly

in payment for property or other assets, except cash, and except that not exceeding 2,000,000 of such shares may be issued after April 13, 1970 to employees (including directors and officers) of Du Pont, and of any corporation in which Du Pont shall directly or indirectly own 50% or more of the voting stock, or to a trustee or trustees on behalf of such employees, upon payment at such price or prices, and on such terms and conditions as may be prescribed and determined by the Board of Directors, or, in the case of stock issued upon the exercise of stock options, by a duly designated standing committee of the Board. Of the 2,000,000 shares which may be so issued to employees under the Certificate of Incorporation, as amended, 525,108 have been issued or have been awarded and are awaiting issue under the Bonus Plans at June 30, 1972.

DESCRIPTION OF CHRISTIANA CAPITAL STOCK

The following is a summary of certain provisions and rights of holders of the capital stock of Christiana.

7% Cumulative Preferred Stock—($100 par value)

Dividend Rights. Holders of the Christiana preferred stock are entitled to receive cumulative dividends declared and set apart for payment before payment of dividends on the common stock, at the annual rate of $7 a share, payable quarterly on the 1st day of January, April, July and October.

Voting Rights. Holders of Christiana preferred stock have no voting rights except as expressly provided by law.

Liquidation Rights. In the event of any liquidation or dissolution or winding-up of Christiana,

whether voluntary or involuntary, holders of Christiana preferred stock shall be entitled to be paid $100 a share and accumulated dividends.

Pre-emptive Rights. No holder of any shares of Christiana preferred stock has any pre-emptive right of subscription to any securities of Christiana.

Redemption Provisions. Christiana preferred stock is subject to redemption in whole or in part at $120 a share on any dividend payment date, in such manner as the Board of Directors shall determine.

Common Stock—($1.25 par value)

Dividend Rights. Subject to the rights of Christiana preferred stock, holders of Christiana common stock are entitled to receive such dividends as the Board of Directors may declare from surplus or net profits.

Voting Rights. Holders of Christiana common stock have the right to vote on all questions to the exclusion of the holders of Christiana preferred stock, except as otherwise provided by law.

Liquidation Rights. Upon any liquidation or dissolution or winding-up of Christiana, whether voluntary or involuntary, after payment in full of the liquidation preferences of Christiana preferred stock, the holders of Christiana common stock are entitled to share pro rata in the remaining assets available for distribution.

Pre-emptive Rights. Holders of Christiana common stock have, to the extent provided for by Delaware law, pre-emptive rights of subscription to additional issues of Christiana securities.

RIGHTS OF CHRISTIANA PREFERRED STOCKHOLDERS OBJECTING TO THE MERGER

Any holder of Christiana preferred stock who objects to the proposed merger may elect to be paid the value of such stock (exclusive of any element of value arising from the expectation or accomplishment of the merger), provided that he complies with the requirements of Section 262 of the Delaware General Corporation Law. No such right applies to the holders of Christiana common stock, Du Pont common stock or Du Pont preferred stock. Any holder of Christiana preferred stock seeking to exercise such right must follow the procedure specified in Section 262, and the following description of that procedure is qualified in its entirety by express reference to the full text of Section 262 which is attached as Exhibit D to this Proxy Statement.

To be paid the value of his stock, an objecting Christiana preferred stockholder must file with Christiana, before the taking of the vote on the adoption of the Agreement of Merger, a written objection to the proposed merger. A written objection will be deemed filed only if it is mailed or delivered to Christiana and is actually received by Christiana before the taking of the vote on the Agreement of Merger. Within 10 days after the effective date of the merger, Du Pont, as the surviving corporation, will give written notice of the effectiveness of the merger to all holders of record of Christiana preferred stock who have filed with Christiana written objection to the merger. The objecting stockholder must, within 20 days after the mailing of such notice to him, demand in writing from Du Pont, as the surviving corporation, the value of his Christiana preferred stock.

If within 30 days after the above-mentioned 20-day period, Du Pont and the objecting stockholder do not

agree upon the value of his stock, either Du Pont or the stockholder may, within 4 months after expiration of said 30-day period, file a petition in the Delaware Court of Chancery demanding a determination of the value of his stock by an appraiser appointed by the Court. The costs of the appraisal, including the fees and expenses of the appraiser, but excluding any fees of counsel or experts retained by any party, may be assessed against one or more parties to the proceedings as the Court may consider equitable. The Court may also, upon application of any party, determine the amount of interest, if any, to be paid upon the value of the stock of the shareholders entitled thereto.

Certain effects of the exercise of appraisal rights are mentioned herein under "Tax Consequences of Merger".

Certain Provisions of the Plan and Agreement of Merger

The obligations of Christiana and Du Pont to consummate the merger are subject to certain conditions set forth in the Plan, including receipt of satisfactory rulings from the Internal Revenue Service (discussed herein under "Tax Consequences of Merger"), authorization for listing on the New York Stock Exchange of the shares of Du Pont common stock to be issued to the Christiana stockholders, receipt of certain legal opinions and the acuracy of certain representations made by Du Pont and Christiana as to their respective affairs at the time of the merger. The representations of the two companies as to their respective affairs at the time of the merger will terminate when the merger becomes effective. The Plan provides that either party may waive any condition to which its obligations under the Plan are subject.

The Plan and the Agreement of Merger may be modified or abandoned at any time prior to the effective date

by mutual agreement of the Boards of Directors of Du Pont and Christiana, except that the Agreement of Merger may not be amended after adoption by stockholders of either Christiana or Du Pont. The obligations of Du Pont and Christiana to consummate the merger terminate on December 31, 1972, unless the parties mutually agree to an extension.

Other Matters

The Board of Directors knows of no other matters which may be presented for stockholder action at the meeting, but if other matters do properly come before this meeting, it is intended that the persons named in the proxy will vote your stock according to their best judgment.

Exhibit A

AGREEMENT AND PLAN OF REORGANIZATION
between
E. I. DU PONT DE NEMOURS AND COMPANY
and
CHRISTIANA SECURITIES COMPANY

AGREEMENT AND PLAN OF REORGANIZATION dated this .... day of ....., 1972 (hereinafter the "Agreement") by and between E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation (hereinafter sometimes referred to as "Du Pont" or the "Surviving Corporation"), and CHRISTIANA SECURITIES COMPANY, a Delaware corporation (hereinafter sometimes referred to as "Christiana").

WITNESSETH:

WHEREAS, Du Pont is a corporation duly organized and existing under the laws of the State of Delaware, having been incorporated on September 4, 1915, under the General Corporation Law of Delaware, and has an authorized capital stock of 64,000,000 shares of which 60,000,000 are Common Stock and 4,000,000 are Preferred Stock;

WHEREAS, Christiana is a corporation duly organized and existing under the laws of the State of Delaware, having been incorporated on March 1, 1915, under the General Corporation Law of Delaware, and has an authorized capital stock of 13,706,500 shares of which 13,600,000 are Common Stock and 106,500 are Preferred Stock;

WHEREAS, the respective Boards of Directors of Du Pont and Christiana have adopted resolutions approving this Agreement providing, as a part hereof, for the merger of Christiana into Du Pont as contemplated hereby (hereinafter the "Merger"), such Merger to be upon the terms and conditions set forth in the Agreement of Merger attached hereto as Exhibit A, and such respective Boards of Directors have directed, subject to the conditions specified herein, that pursuant to the provisions of Section 251 of the General Corporation Law of Delaware, the Agreement of Merger be submitted to the stockholders of Du Pont and of Christiana at special meetings separately called and held for the purpose of considering and voting upon the adoption or rejection thereof; and

WHEREAS, this Agreement is intended to constitute a plan of reorganization pursuant to Section 368 of the Internal Revenue Code of 1954.

NOW, THEREFORE, in consideration of the premises and the mutual agreements, covenants and provisions herein contained, the parties hereto have agreed and do hereby agree to merge subject to the conditions hereinafter set forth, as follows:

1. Agreement to Merge.

The parties hereby agree that, subject to the terms and conditions of this Agreement, each of them shall duly execute and deliver to the other party hereto an Agreement of Merger substantially in the form attached hereto as Exhibit A and shall take appropriate action to cause such Agreement of Merger to become effective.

2. Closing.

The closing of the transaction provided for in Article 1 shall take place at the offices of Du Pont, Du Pont Build-

ing, Wilmington, Delaware, at 10:00 a.m. on December 1, 1972, or as soon thereafter as possible; provided, however, that if the Merger is not consummated on or before December 31, 1972, this Agreement, unless mutually extended in writing by the parties hereto, shall terminate without liability of any kind on the part of either party. Promptly following the closing, Christiana and Du Pont shall each cause to be filed the Agreement of Merger in final form, properly executed and acknowledged, in accordance with the provisions of the General Corporation Law of Delaware. The date on which the Agreement of Merger becomes effective pursuant to the provisions of said law is hereinafter referred to as the "Effective Date."

3. *Representations and Warranties of Christiana.*

Christiana hereby represents and warrants as follows:

3.1 *Organization.* Christiana is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and is not required to be qualified to do business in any jurisdiction; and the copies of Christiana's Certificate of Incorporation, as amended, certified by the Secretary of State of Delaware, and of Christiana's By-Laws, certified by Christiana's Secretary, which have been delivered to Du Pont, are complete and correct as of the date of this Agreement.

3.2 *Capitalization.* Christiana's authorized capital stock consists of 106,500 shares of Seven Per Cent. Cumulative Non-voting Preferred Stock of the par value of $100 per share, of which 106,500 shares are validly issued and outstanding, and 13,600,000 shares of Common Stock of the par value of $1.25 per share, of which 11,710,103 shares are validly issued and outstanding; Christiana is not

a party to any options, calls or commitments of any character relating to the purchase or sale of Christiana's authorized or issued stock.

3.3 *Authority.* The execution, delivery and performance of this Agreement by Christiana, including without limitation the merger of Christiana into Du Pont on the terms as set forth herein, have been duly and effectively authorized by the Board of Directors of Christiana, subject to adoption of the Agreement of Merger by the stockholders of Christiana, and subject to such other conditions as are provided herein.

3.4 *Financial Statements.* Christiana has delivered to Du Pont copies of the following financial statements, all of which have been prepared in accordance with generally accepted accounting principles consistently followed throughout the periods indicated:

(i) balance sheet of Christiana as at December 31, 1971, and statements of income and undistributed net income for the years ended December 31, 1971, and 1970, in each case including notes thereto, certified by Haskins & Sells, certified public accountants; and

(ii) balance sheet of Christiana as at June 30, 1972, and statement of income and undistributed net income for the six-month period ended June 30, 1972, including notes thereto, certified by Haskins & Sells, certified public accountants.

Each of the aforesaid balance sheets fairly presents as of its date the financial condition and assets and liabilities of Christiana, and each of the aforesaid statements of income and undistributed net income fairly presents the results of operations of Christiana for the period indicated.

3.5 *Absence of Undisclosed Liabilities.* Except as otherwise contemplated by this Agreement and except as and to the extent reflected or reserved against in Christiana's balance sheet as at June 30, 1972, as of the date thereof Christiana had no material liabilities or obligations (whether accrued, absolute, contingent or otherwise) of a nature customarily reflected in a corporate balance sheet prepared in accordance with generally accepted accounting principles.

3.6 *Absence of Certain Changes or Events.* Since June 30, 1972, there has not been:

(i) any change in Christiana's financial condition, assets, liabilities or business, other than changes in the ordinary course of business, none of which has been material and adverse;

(ii) any declaration, setting aside or payment of any dividend or other distribution in respect of Christiana's capital stock, except for quarterly cash dividends paid in accordance with its customary practices; and

(iii) any other event or condition of any character which has materially and adversely affected Christiana's assets or business.

3.7 *Tax Matters.* The provision made for taxes on Christiana's balance sheet as at June 30, 1972, is sufficient for the payment of all accrued and unpaid Federal, state and local taxes of Christiana, whether or not disputed, for the six-month period ended on June 30, 1972, and for all years prior thereto. Christiana's Federal income tax returns have been audited by the Internal Revenue Service for all open years to and including the year ended December 31, 1970, except for 1968 and 1969. All Federal, state

and local taxes due and payable by Christiana on or before the date of this Agreement have been paid. The Internal Revenue Service has proposed a deficiency in Federal income taxes for 1967 of approximately $89,000 which Christiana is contesting.

3.8 *Absence of Liens and Encumbrances.* Christiana has good and marketable title to all of its assets (including those reflected in Christiana's balance sheet as at June 30, 1972, except as since sold or otherwise disposed of in the ordinary course of business) free and clear of all liens, pledges or other encumbrances.

3.9 *Litigation.* Except for (i) *Christiana Securities Co. v. United States,* C. A. No. 3831 (D. Del.), and (ii) any litigation affecting Du Pont, there is no litigation, proceeding or governmental investigation pending, or, so far as known to Christiana, threatened against or relating to Christiana or its assets or business, or the transactions contemplated by this Agreement, nor is there any basis known to Christiana for any such action.

3.10 *Governmental Authorities.* Christiana is duly registered as a nondiversified management investment company under the Investment Company Act of 1940, and is in full compliance with, and not in default of the performance of any action required under such Act, the Rules and Regulations of the Securities and Exchange Commission (the "Commission") adopted thereunder or any order of the Commission entered thereunder. Christiana is not a bank holding company as defined in the Bank Holding Company Act of 1956.

3.11 *Securities.* Christiana had valid and marketable title, free of any liens and encumbrances, to the following securities as of June 30, 1972:

13,417,120 shares	Du Pont Common Stock
16,256 shares	Du Pont $4.50 Series Cumulative Preferred Stock
69,216 shares	Wilmington Trust Company Common Stock
7,460 shares	The News-Journal Company Common Stock

3.12 *The News-Journal Company.* Christiana owns all the outstanding equity securities of The News-Journal Company and such securities are validly issued, fully paid and nonassessable; such company is duly organized and validly existing under the laws of the State of Delaware and is duly qualified to do business in all states in which the nature of its business as now conducted requires it to be qualified; the balance sheet of such company as at December 31, 1971, and the statements of income for the years ended December 31, 1970, and 1971, certified by Price Waterhouse & Co., previously delivered to Du Pont, have been prepared in accordance with generally accepted accounting principles consistently followed throughout the periods indicated; such balance sheet fairly presents as of its date the financial condition and assets and liabilities of such company; such statements of income fairly present the results of operations of such company for the periods indicated; and since December 31, 1971, except for earnings trends reflected in unaudited interim financial statements delivered to Du Pont, there has not been any change in such company's financial condition, assets, liabilities, or business other than changes in the ordinary course of business, none of which has been material and adverse, or any other event or condition which has materially and adversely affected such company's assets or business.

4. Representations and Warranties of Du Pont.

Du Pont hereby represents and warrants as follows:

4.1 *Organization.* Du Pont is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, has the corporate power to carry on its business as it is now being conducted, and is qualified to do business in each jurisdiction other than Delaware where it owns any principal manufacturing plants or in which the nature of its business requires it to be so qualified. The copies of Du Pont's Certificate of Incorporation, as amended, certified by the Secretary of State of Delaware, and of Du Pont's By-Laws, certified by Du Pont's Secretary, which have been delivered to Christiana, are complete and correct as of the date of this Agreement. Du Pont has valid title to all its principal manufacturing plants and facilities and to the stock it holds of each company which, under the Rules and Regulations of the Commission promulgated pursuant to the Securities Act of 1933, constitutes a significant subsidiary (the "Significant Subsidiaries").

4.2 *Capitalization.* Du Pont's authorized capital stock consists of 4,000,000 shares of Preferred Stock without par value, of which on June 30, 1972, there were issued and outstanding 1,688,850 shares of the $4.50 Series and 700,000 shares of the $3.50 Series, and 60,000,000 shares of Common Stock of the par value of $5.00 per share, of which on June 30, 1972, there were issued and outstanding or held in treasury 47,566,594 shares.

4.3 *Authority.* The execution, delivery and performance of this Agreement, including without limitation the merger of Christiana into Du Pont, on the terms as set forth herein, have been duly and effectively authorized by the Board of Directors of Du Pont, subject to adoption of

the Agreement of Merger by the stockholders of Du Pont and subject to such other conditions as are provided herein.

4.4 *Financial Statements.* Du Pont has delivered to Christiana copies of the following financial statements, all of which have been prepared in accordance with generally accepted accounting principles consistently followed throughout the periods indicated:

(i) consolidated balance sheet of Du Pont as at December 31, 1971, and statements of income and stockholders' equity for the years ended December 31, 1971, and 1970, in each case including notes thereto, certified by Price Waterhouse & Co., certified public accountants; and

(ii) consolidated balance sheet of Du Pont as at June 30, 1972, and statement of income for the six-month period ended June 30, 1972.

Each of the aforesaid consolidated balance sheets fairly presents as of its date the financial condition and assets and liabilities of Du Pont and each of the aforesaid statements of income and stockholders' equity fairly presents the results of operations of Du Pont for the period indicated.

4.5 *Absence of Undisclosed Liabilities.* Except as otherwise contemplated by this Agreement and except as and to the extent reflected or reserved against in the consolidated balance sheet of Du Pont as at June 30, 1972, as of the date thereof Du Pont had no material liabilities or obligations (whether accrued, absolute, contingent or otherwise) of a nature customarily reflected in a corporate balance sheet prepared in accordance with generally accepted accounting principles.

4.6 *Absence of Certain Changes or Events.* Since June 30, 1972, there has not been:

(i) any change in financial condition, assets, liabilities or business of Du Pont and the Significant Subsidiaries, taken as a whole, other than changes in the ordinary course of business, none of which has been material and adverse;

(ii) any declaration, setting aside or payment of any dividend or other distribution in respect of Du Pont's capital stock, except for quarterly cash dividends paid in accordance with its customary practices; and

(iii) any other event or condition of any character which has materially and adversely affected the business or assets of Du Pont.

4.7 *Tax Matters.* The provision made for taxes on Du Pont's consolidated balance sheet as at June 30, 1972, is sufficient for the payment of all accrued and unpaid Federal, state and local taxes of Du Pont, whether or not disputed, for the six-month period ended on June 30, 1972, and for all years prior thereto. Du Pont's Federal income tax returns have been audited by the Internal Revenue Service for all open years to and including the year ended December 31, 1965. All Federal, state and local taxes due and payable by Du Pont on or before the date of this Agreement have been paid.

4.8 *Litigation.* Du Pont has delivered to Christiana a list of significant suits or proceedings pending against Du Pont. There is no other litigation, proceeding or governmental investigation pending, or, so far as known to Du Pont, threatened against or relating to Du Pont or its Significant Subsidiaries, or its or their assets or business, the effect of which would be material and adverse to the assets or business of Du Pont and the Significant Subsidiaries taken as a whole, nor is there any basis known to Du Pont for any such action.

4.9 *Disposition of Certain Assets.* It is Du Pont's present intention, following the Effective Date, to dispose of the 69,216 shares of Wilmington Trust common stock and the interest in The News-Journal Company it will acquire pursuant to the Merger, it being recognized by the parties hereto that Du Pont intends to exercise its business judgment as to the timing, manner, terms and other conditions of disposition.

5. Access and Information.

Christiana and Du Pont hereby agree that each will give to the other and to the other's counsel, accountants and other representatives, full access, during normal business hours throughout the period prior to the date of closing, to all of its properties, books, contracts, commitments and records relevant to its performance under this Agreement, and that each will furnish the other during such period with all such information concerning its affairs as such other party may reasonably request.

6. Covenants of Christiana.

Christiana hereby covenants and agrees that prior to the Effective Date, it will not, without the prior written consent of Du Pont, except as otherwise specifically provided in this Agreement:

(a) amend its Certificate of Incorporation or By-Laws;

(b) engage in any activity or transaction or incur any obligation (by contract or otherwise) except in the ordinary course of business;

(c) sell or otherwise dispose of any of the securities listed in paragraph 3.11 of Article 3;

(d) issue rights or options to purchase or subscribe to, or subdivide, any shares of its capital stock;

(e) issue or sell any shares of its capital stock; or

(f) declare any dividends on, or make any distributions in respect of, any shares of its capital stock, or purchase or acquire for value any shares of its capital stock, except that Christiana may declare and pay quarterly cash dividends on its capital stock, the amounts and dates of such declarations and payments to be determined in accordance with its customary dividend policies and practices.

7. Covenants of Du Pont.

Du Pont hereby covenants and agrees as follows:

7.1 *Certificate of Incorporation.* Prior to the Effective Date, it will not, except as otherwise consented to in writing by Christiana, adopt any amendment (other than the proposed amendment set forth in the Agreement of Merger) to its Certificate of Incorporation which would affect in any manner the preferences, rights or powers of Du Pont Common Stock, or the number of shares thereof which are authorized or outstanding.

7.2 *Authorized Shares.* It will keep continuously available such number of authorized and unissued shares of Common Stock as is necessary to make the Contingent Share Distribution referred to in Article Fifth of the Agreement of Merger.

7.3 *Exchange Listing.* It will use its best efforts to list on the New York Stock Exchange effective upon notice of issuance the shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of Merger.

8. Covenants of Christiana and Du Pont.

8.1 *Applications.* Du Pont and Christiana have jointly applied to the Commission for an order or orders granting

all necessary approval and authority for the Merger and have jointly applied to the Internal Revenue Service for certain rulings with respect to the tax consequences of the Merger, and shall cooperate to the end that the requested order and rulings shall issue as promptly as possible.

8.2 *Stockholder Action.* As soon as possible after receiving a final order from the Commission as contemplated in paragraph 8.1 of this Article, Christiana shall submit the Agreement of Merger to its stockholders for the purpose of considering and acting upon the adoption thereof and Du Pont shall submit the Agreement of Merger (including as a part thereof the amendment to its Certificate of Incorporation to increase its authorized Common Stock to 65,000,000 shares) to its stockholders for the purpose of considering and acting upon the adoption thereof. Christiana and Du Pont will each supply the other with material for inclusion in their respective proxy statements describing their respective businesses which shall meet the requirements of the Investment Company Act of 1940 and the Securities Exchange Act of 1934 and the Rules and Regulations of the Commission thereunder as to proxy statements.

9. *Conditions Precedent to Obligations of Christiana.*

Each and every obligation of Christiana to be performed on or prior to the date of closing shall be subject to the satisfaction, on or before the date of closing, of the following conditions:

9.1 *Representations and Warranties.* Except for changes therein permitted or required under this Agreement, the representations and warranties of Du Pont set forth in this Agreement shall be true in all material respects as of the date hereof and as of the date of closing; Du Pont shall have performed and complied with all agreements and conditions required by this Agreement to

be performed or complied with by it prior to or on the date of closing; and Christiana shall have been furnished with a certificate of appropriate officers of Du Pont, dated the date of the closing, certifying in such detail as Christiana may reasonably request to the fulfillment of the foregoing conditions.

9.2 *Internal Revenue Service Rulings.* The Internal Revenue Service shall have issued a ruling or rulings satisfactory in form and substance to Christiana and to Dechert Price & Rhoads substantially to the following effect:

(a) No gain or loss will be recognized to Christiana upon the transfer of its assets to and the assumption of its liabilities by Du Pont pursuant to this Agreement and the Agreement of Merger, and no gain or loss will be recognized to Christiana upon the distribution by Christiana of Du Pont Common Stock and cash to the preferred shareholders of Christiana in exchange for their Christiana Preferred Stock or upon the distribution by Christiana of Du Pont Common Stock to the common stockholders of Christiana in exchange for their Christiana Common Stock;

(b) No gain or loss will be recognized to Du Pont upon the issuance of its Common Stock pursuant to this Agreement and the Agreement of Merger;

(c) No gain or loss will be recognized to the holders of Christiana Preferred Stock on the conversion of such stock in accordance with this Agreement and the Agreement of Merger, except that such ruling shall be deemed to be satisfactory notwithstanding that it states that the cash received by such holders will be taxable to them as capital gain or ordinary income;

(d) No gain or loss will be recognized to the holders of Christiana Common Stock upon the conversion of such stock into Du Pont Common Stock, including stock, if any, received in the Contingent Share Distribution (as that term is defined in the Agreement of Merger) but excluding any such stock treated as interest;

(e) The basis of the Du Pont Common Stock (except for any portion of the Contingent Share Distribution treated as interest) received by the holders of the Christiana Preferred Stock and of the Christiana Common Stock will be the same as the basis of the Christiana Preferred Stock or Common Stock converted thereinto, except that such ruling shall be deemed to be satisfactory notwithstanding that it states or indicates that adjustments are to be made (1) for the cash received by the holders of the Christiana Preferred Stock, (2) for the stockholder's interest in, and for the receipt of, the Contingent Share Distribution in the case of the holders of the Christiana Common Stock, and (3) for the gain, if any, recognized to the holders of the Christiana Preferred Stock; and

(f) The holding period of the Du Pont Common Stock (except for any portion of the Contingent Share Distribution treated as interest) received by the stockholders of Christiana will include the period during which the stock converted thereinto was held, provided that the stock so converted was a capital asset in the hands of the respective stockholder.

9.3 *Commission Order.* The Commission shall have issued a final order pursuant to the Investment Company Act of 1940, satisfactory in form and substance to Christiana and to Dechert Price & Rhoads, exempting the Merger from the provisions of Section 17 of the Act.

9.4 *Exchange Listing.* The shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of Merger shall have been authorized for listing on the New York Stock Exchange upon official notice of issuance.

9.5 *Opinions of Counsel.* Christiana shall have been furnished with an opinion, dated as of the date of closing, of Charles E. Welch, Esq., Assistant General Counsel to Du Pont, as to the matters specified in (i), (ii), (iii) and (vi) below, of Covington & Burling as to the matters specified in (ii), (iii), (iv), (v) and (vi) below, and of Dechert Price & Rhoads as to such of the matters specified in (ii), (iii), (iv), (v) and (vi) below as Christiana may have requested (each of which counsel may, as to matters of Delaware law, rely upon the opinion of Mr. Welch):

(i) Du Pont is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, and has corporate power to carry on its business as it is then being conducted;

(ii) the execution, delivery and performance of this Agreement and the Agreement of Merger by Du Pont have been duly authorized and approved by all requisite action of the Board of Directors and stockholders of Du Pont, this Agreement and the Agreement of Merger have been duly executed and delivered by Du Pont and this Agreement constitutes and the Agreement of Merger when it becomes effective will constitute a valid and binding obligation of Du Pont in accordance with their terms;

(iii) all shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of

Merger to holders of capital stock of Christiana will upon such issuance in accordance with this Agreement and the Agreement of Merger be validly issued, fully paid and nonassessable;

(iv) the shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of Merger are not required to be registered under the Securities Act of 1933 or the Rules and Regulations of the Commission as in effect on the date of the opinion, or, if such registration is required, such registration has become effective;

(v) all necessary orders and approvals of the Commission under the Investment Company Act of 1940 have been received; and

(vi) no suit, action or other proceeding is to the best of the knowledge of such counsel pending or threatened before any court or administrative agency which, in such counsel's opinion, would result in a judgment or order preventing consummation of the Merger.

10. Conditions Precedent to Obligations of Du Pont.

Each and every obligation of Du Pont to be performed on or prior to the date of closing shall be subject to the satisfaction, on or before the date of closing, of the following conditions:

10.1 *Representations and Warranties.* Except for changes therein permitted or required under this Agreement, the representations and warranties of Christiana set forth in this Agreement shall be true in all material respects as of the date hereof and as of the date of closing; Christiana shall have performed and complied with all agreements and conditions required by this Agreement to be performed or complied with by it prior to or at the date

of closing; and Du Pont shall have been furnished with a certificate of appropriate officers of Christiana, dated the date of closing, certifying in such detail as Du Pont may reasonably request to the fulfillment of the foregoing conditions.

10.2 *News-Journal Certificate.* Du Pont shall have been furnished with a certificate of appropriate officers of The News-Journal Company dated the date of closing to the effect that since December 31, 1971, except for earnings trends reflected in unaudited interim financial statements delivered to Du Pont, there has been no material and adverse change in the business and assets and in the condition and operations, financial or otherwise, of such company.

10.3 *Internal Revenue Service Rulings.* The Internal Revenue Service shall have issued a ruling or rulings satisfactory in form and substance to Du Pont and to Covington & Burling substantially to the following effect:

(a) No gain or loss will be recognized to Christiana upon the transfer of its assets to and the assumption of its liabilities by Du Pont pursuant to this Agreement and the Agreement of Merger, and no gain or loss will be recognized to Christiana upon the distribution by Christiana of Du Pont Common Stock and cash to the preferred shareholders of Christiana in exchange for their Christiana Preferred Stock or upon the distribution by Christiana of Du Pont Common Stock to the common stockholders of Christiana in exchange for their Christiana Common Stock;

(b) No gain or loss will be recognized to Du Pont upon the issuance of its Common Stock pursuant to this Agreement and the Agreement of Merger;

(c) The basis to Du Pont of the assets acquired from Christiana pursuant to this Agreement and the Agreement of Merger will be the same as the basis of such assets to Christiana immediately before the Effective Date of the Merger; and

(d) The holding period to Du Pont of the assets acquired from Christiana pursuant to this Agreement and the Agreement of Merger will include the holding period of such assets to Christiana.

10.4 *Commission Order.* The Commission shall have issued a final order pursuant to the provisions of the Investment Company Act of 1940 satisfactory in form and substance to Du Pont and to Covington & Burling, exempting the Merger from the provisions of Section 17 of the Act.

10.5 *Disposition of Shares.* Those stockholders of Christiana who will be restricted by the Securities Act of 1933 with respect to disposition of shares of Du Pont Common Stock received as a result of the Merger shall have entered into agreements with Du Pont, in a form satisfactory to Du Pont, regarding obligations of the parties to such agreements in connection with any dispositions of such shares of Du Pont Common Stock by such stockholders.

10.6 *Opinions of Counsel.* (a) Du Pont shall have been furnished with an opinion, dated as of the date of closing, of Covington & Burling as to the matters specified in (ii), (iii), (iv) and (v) below and of Dechert Price & Rhoads as to each of the matters set forth below (each of whom, as to matters of Delaware law, may rely on the opinion of Morris, Nichols, Arsht & Tunnell) to the effect that:

(i) Christiana is a corporation duly organized, validly existing and in good standing under the laws

of the State of Delaware, and has corporate power to carry on its business as it is then being conducted;

(ii) the execution, delivery and performance of this Agreement and the Agreement of Merger by Christiana have been duly authorized and approved by all requisite action of the Board of Directors and stockholders of Christiana, this Agreement and the Agreement of Merger have been duly executed and delivered by Christiana and this Agreement constitutes and the Agreement of Merger when it becomes effective will constitute a valid and binding obligation of Christiana in accordance with their terms;

(iii) the shares of Du Pont Common Stock issuable pursuant to Article Fifth of the Agreement of Merger are not required to be registered under the Securities Act of 1933 or the Rules and Regulations of the Commission as in effect on the date of the opinion, or, if such registration is required, such registration has become effective;

(iv) all necessary orders and approvals of the Commission under the Investment Company Act of 1940 have been received; and

(v) no suit, action or other proceeding is to the best of the knowledge of such counsel pending or threatened before any court or administrative agency which, in such counsel's opinion, would result in a judgment or order preventing consummation of the Merger.

(b) Du Pont shall have been furnished with an opinion, dated as of the date of closing, of Richards, Layton & Finger, counsel to The News-Journal Company, to the effect that:

(i) The News-Journal Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, and has corporate power to carry on its business as it is then being conducted; and

(ii) all shares of The News-Journal Company capital stock outstanding as of the date of such opinion are validly issued, fully paid and non-assessable.

11. Termination of Warranties and Representations.

All statements contained in any certificate, instrument or document delivered by or on behalf of the parties pursuant to this Agreement shall be deemed representations and warranties by the respective parties hereunder. None of the representations, warranties, agreements and covenants hereunder shall survive the Effective Date except for the representation of Du Pont made pursuant to paragraph 4.9 of Article 4 hereof and the covenant of Du Pont made pursuant to paragraph 7.2 of Article 7 hereof.

12. Waiver.

Either party hereto may at its option waive in writing any and all covenants and conditions herein contained to which its obligations hereunder are subject.

13. Termination.

Anything herein to the contrary notwithstanding, this Agreement and the Agreement of Merger may be terminated and the Merger may be abandoned at any time prior to the date of closing:

(a) by mutual agreement evidenced by resolutions of the Boards of Directors of the parties hereto; or

(b) by Du Pont in the event that (i) the Agreement of Merger shall not be approved by its stockholders by the requisite vote, or (ii) any suit, action or other proceeding shall have been instituted or is threatened before any court or administrative agency which, in the opinion of Covington & Burling, would result in an order requiring the divestment of any assets acquired by Du Pont as a result of the Merger, other than stock of Wilmington Trust Company or The News-Journal Company; or

(c) by Christiana in the event the Agreement of Merger shall not be approved by its stockholders by the requisite vote.

14. Amendments.

This Agreement may be amended or modified only by a written instrument executed by Christiana and Du Pont acting by their respective officers thereunto duly authorized by their respective Boards of Directors. No such amendment shall be made to the Agreement of Merger after it shall have been adopted by the shareholders of Christiana or Du Pont.

15. Notices.

All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered or mailed, first class postage prepaid,

(a) if to Christiana, marked to the attention of Mr. Irénée du Pont, Jr., President, Christiana Securities Company, Du Pont Building, Wilmington, Delaware 19898, or

(b) if to Du Pont, marked to the attention of Mr. Charles B. McCoy, Chairman and President, E. I.

du Pont de Nemours and Company, Du Pont Building, Wilmington, Delaware 19898,

or to such other persons or such other address as shall be furnished in writing by either party to the other.

16. Counterparts.

This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

17. Governing Law.

This Agreement shall be construed and enforced in accordance with the laws of the State of Delaware.

IN WITNESS WHEREOF, the undersigned parties hereto have duly executed this Agreement on the date first above written.

(SEAL) CHRISTIANA SECURITIES COMPANY

Attest:

..... By .....
Secretary *President*

(SEAL) E. I. DU PONT DE NEMOURS AND COMPANY

Attest:

..... By .....
Secretary *Chairman of the Board and President*

EXHIBIT A

AGREEMENT OF MERGER

THIS AGREEMENT OF MERGER, dated as of the .... day of ....., 1972, is made pursuant to Section 251 of the General Corporation Law of the State of Delaware by and between CHRISTIANA SECURITIES COMPANY, a Delaware corporation (hereinafter sometimes called "Christiana"), and E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation (hereinafter sometimes called "Du Pont" or the "Surviving Corporation"). Christiana and Du Pont are referred to herein collectively as the "Constituent Corporations".

WITNESSETH:

The Constituent Corporations have agreed that Christiana shall be merged into Du Pont and that the terms and conditions of said Merger, the plan and mode of carrying the same into effect, the amendment of the Certificate of Incorporation of Du Pont as the Surviving Corporation, the manner of converting shares of Christiana into shares of Du Pont and cash the holders of shares of Christiana are to receive, the retirement of certain shares of Du Pont's capital stock, and other matters with respect to the Merger are and shall be as follows:

First. Upon the effective date of the Merger, as defined in Article Third hereof (the "Effective Date"), Christiana shall be merged into Du Pont which shall be the Surviving Corporation and which shall continue its corporate existence and remain a Delaware corporation governed by the laws of the State of Delaware.

Second. (a) The corporate name of the Surviving Corporation shall remain E. I. du Pont de Nemours and Company;

(b) The Certificate of Incorporation of Du Pont shall be amended as follows:

> The second and third paragraphs of Article FOURTH shall be deleted and in their place shall be inserted the following paragraph:
>
> > "The total number of shares of all classes of stock which the corporation shall have authority to issue shall be Sixty-nine Million (69,000,000), of which Four Million (4,000,000) shares shall be Preferred Stock without par value and Sixty-five Million (65,000,000) shares shall be Common Stock having a par value of Five Dollars ($5.00) each."

The Certificate of Incorporation of the Surviving Corporation shall not be amended in any other respect by reason of the Merger, and the Certificate of Incorporation of the Surviving Corporation as heretofore amended and as further amended hereby shall be the Certificate of Incorporation of the Surviving Corporation until any further amendment is made pursuant to the laws of the State of Delaware;

(c) The By-Laws of Du Pont shall be the By-Laws of the Surviving Corporation and shall continue in force and effect, until duly altered, amended or repealed; and

(d) The directors of Du Pont on the Effective Date shall constitute the Board of Directors of the Surviving Corporation and shall serve until the next annual meeting of stockholders of the Surviving Corporation, and until their successors are chosen and shall have qualified, as provided in the By-Laws of the Surviving Corporation.

Third. When this Agreement of Merger has been adopted by vote of the holders of a majority of the issued

and outstanding shares of Christiana and of Du Pont entitled to vote thereon, it shall, subject to conditions specified in an Agreement and Plan of Reorganization between the Constituent Corporations dated , 1972, be executed, acknowledged and submitted for filing in the manner prescribed by Section 251 of the General Corporation Law of the State of Delaware. This Agreement of Merger shall become effective at the close of business on the date it is so filed with the Secretary of State of Delaware. Such date is referred to herein as the Effective Date.

Fourth. Upon the Effective Date, the separate existence of Christiana shall cease and the Surviving Corporation shall thereupon and thereafter possess all of the rights, privileges, powers and franchises as well of a public as of a private nature, and be subject to all the restrictions, disabilities and duties of each of such corporations so merged; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to each of the Constituent Corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of the Constitutent Corporations shall be vested in the Surviving Corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the Surviving Corporation as they were of the respective Constituent Corporations, and the title to any real estate, vested by deed or otherwise, under the laws of the State of Delaware, in either of the Constituent Corporations shall not revert or be in any way impaired by virtue of such Merger; but all rights of creditors and all liens upon any property of the Constituent Corporations shall be preserved unimpaired, and all debts, liabilities and duties of

the Constituent Corporations shall thenceforth attach to the Surviving Corporation and may be enforced against it to the same extent as if the said debts, liabilities and duties had been incurred or contracted by it.

If at any time the Surviving Corporation shall consider or be advised that any further assignments or assurances in law or other things are necessary or desirable to vest, or to perfect or to confirm, of record or otherwise, in the Surviving Corporation, the title to any property of Christiana acquired or to be acquired as a result of the Merger provided for herein, both the proper officers and directors of Christiana and the proper officers and directors of the Surviving Corporation are fully authorized to execute and deliver any and all proper deeds, assignments and assurances in law and to do all things necessary and proper in the name of Christiana or otherwise so as to vest, perfect or confirm title to such property in the Surviving Corporation, and otherwise carry out the purposes of this Agreement of Merger.

Fifth. The manner and basis of converting the issued and outstanding shares of each of the Constituent Corporations and of retiring certain stock of the Surviving Corporation shall be as follows:

(a) Each share of Seven Per Cent. Cumulative Non-voting Preferred Stock of Christiana ($100 par value) issued and outstanding on the Effective Date shall be converted into and become (i) such number of shares, or fraction thereof, of fully paid and non-assessable Common Stock ($5.00 par value) of Du Pont, theretofore authorized and unissued, as is determined by dividing $120 by the average of the closing prices of Du Pont Common Stock on the New York Stock Exchange for the ten trading days immediately preceding the Effective Date plus (ii) an amount in

cash equal to the dividend accrued and unpaid on said Preferred Stock up to and including the Effective Date. The Common Stock capital account of Du Pont shall thereupon be increased by the aggregate par value of said shares issued in the conversion.

(b) Each share of Christiana Common Stock ($1.25 par value) issued and outstanding on the Effective Date shall be converted into 1.123 shares of Common Stock ($5.00 par value) of Du Pont, theretofore authorized and unissued, (the "Effective Date Distribution") and, in addition, a pro rata portion of any shares of Du Pont Common Stock distributed, on or prior to the fifth anniversary of the Effective Date, in any Contingent Share Distribution. The Contingent Share Distribution shall be the number of shares of Du Pont Common Stock determined by dividing the Final Recovery (as defined below) in *Christiana Securities Co. v. United States,* C. A. No. 3831 in the United States District Court for the District of Delaware (the "Tax Claim") by the average of the closing prices of Du Pont Common Stock on the New York Stock Exchange for the ten trading days immediately preceding the date on which such Final Recovery is made. No certificate or scrip with respect to the Contingent Share Distribution shall be issued, and a stockholder's interest therein shall not be assignable except by will or by operation of law. Du Pont's obligation to make such Contingent Share Distribution shall be discharged, and distribution thereof shall be deemed to be made, by conveying, within ten days after the date on which such Final Recovery is made, the shares of Du Pont Common Stock to an agent for the holders of record of Christiana Common Stock on the Effective Date designated by the Tax Claim Com-

mittee referred to below for distribution in accordance with the terms of this Agreement of Merger. In the event the Final Recovery shall be received prior to the Effective Date, the Effective Date Distribution shall be increased by a pro rata share of the number of shares of Du Pont Common Stock obtained by dividing the Final Recovery by $163.875 and there shall be no Contingent Share Distribution. The Common Stock capital account of Du Pont shall be increased by the aggregate par value of shares issued in the conversion constituting the Effective Date Distribution.

(I) Final Recovery shall mean, with respect to the Tax Claim, any amount recovered by settlement as well as by entry of a judgment which shall have become final, including amounts attributable to interest, with the following adjustments:

(i) less the amount, if any, by which the expenses paid or incurred with respect to the Tax Claim subsequent to July 17, 1972 exceed $1,000,000;

(ii) less the applicable income taxes payable by Du Pont or Christiana with respect to the Final Recovery, the rate and amount of such income taxes to be determined by Du Pont;

(iii) less the cost of making the Contingent Share Distribution;

(iv) plus the amount (whether or not any monetary judgment shall be entered), if any, by which the expenses paid or incurred with respect to the Tax Claim subsequent to July 17, 1972 are less than $1,000,000;

(v) plus the sum of the amounts determined at the end of each calendar quarter ending after July 17, 1972 through the date of Final Recovery by multiplying $1,000,000 less the total amount of expenses paid since July 17, 1972 with respect to the Tax Claim by ¼ of the then prevailing prime commercial lending rate of interest of Morgan Guaranty Trust Company of New York;

(vi) plus the amount of any reduction in income taxes of Du Pont and Christiana resulting from expenses with respect to the Tax Claim paid or incurred after July 17, 1972, the rate and amount of such income taxes to be determined by Du Pont or Christiana as the case may be; provided, however, that no adjustment shall be made under this clause (vi) for reduction in income taxes of Du Pont unless the Internal Revenue Service shall have issued a ruling that such expenses are deductible for Federal income tax purposes; and

(vii) plus, if the Contingent Share Distribution is not distributed within one year after the Effective Date, an amount equal to the Final Recovery adjusted as set forth in clauses (i) through (vi) above multiplied by a factor determined by the following formula:

$$\text{Factor} = \frac{.04rt}{1 + .04t - .04rt}$$

where r is the rate of income taxes determined by Du Pont for purpose of clause (ii)

above and *t* is the years and decimal fraction of a year from the Effective Date to the date of Final Recovery; provided, however, that no adjustment shall be made under this clause (vii) unless the Internal Revenue Service shall have issued a ruling that such amounts determined to be the payment of interest under (II) below are deductible by Du Pont for Federal income tax purposes.

The Final Recovery shall be deemed to have occurred when payment is received by Du Pont or Christiana from the United States of America in full settlement of the Tax Claim or in full discharge of any final judgment, or if a judgment denying monetary relief is entered, the date on which such judgment becomes final. In the event that there shall have been no such Final Recovery on or before the 150th day preceding the fifth anniversary of the Effective Date, Du Pont agrees to negotiate in good faith with the Tax Claim Committee to determine the amount which represents the fair value of the Tax Claim at such time. In the event that Du Pont and the Tax Claim Committee are unable to agree on an amount before the 120th day preceding the fifth anniversary of the Effective Date, they shall, within three days after such date, each deliver a written notice to the other designating one appraiser. The two appraisers so designated shall select a third appraiser. In the event that the designated appraisers are unable, or fail, within seven days after their appointment, to agree upon the third appraiser, they or either of them shall immediately request the American Arbitration Association to appoint a third appraiser in accordance with its rules as to appointment of a neutral arbitrator. The third appraiser so selected or appointed shall act as chairman. The appraisers shall meet at the call of the chairman and take such proceedings as they deem necessary to determine the then fair value of the Tax Claim. Within ninety days after the appointment of the third appraiser, but no later than the tenth business day preceding the fifth anniversary of the Effective Date, the appraisers shall deliver to Du Pont and the Tax Claim Committee in writing a statement specifying the then fair value of the Tax Claim. The decision of a majority of such appraisers shall be final and conclusive unless a majority are unable to agree, in which event the determination of the chairman shall be final and conclusive. The amount agreed upon between Du Pont and the Tax Claim Committee or, in the absence of such agreement, the amount determined by the appraisers, representing the then fair value of the Tax Claim shall be supported by a statement specifying the portions thereof deemed to be (1) recovery of tax paid, (2) recovery of interest paid and (3) interest on both of these items, and shall be treated for all purposes hereunder as though it were an amount recovered by settlement of the Tax Claim on the date of such agreement or of such determination by appraisal.

(II) If the Contingent Share Distribution is not distributed within one year after the Effective Date, a portion of any Contingent Share Distribu-

tion shall be deemed the payment of interest on a deferred payment (the "Interest Shares") and the balance shall be deemed to be the payment of principal (the "Principal Shares"). The portion deemed payment of interest shall be determined by multiplying the Final Recovery by a factor determined by the following formula:

$$\text{Factor} = 1 - \frac{1}{1 + .04t}$$

where *t* is the years and decimal fraction of a year from the Effective Date to the date of distribution of the Contingent Share Distribution.

(III) If the Contingent Share Distribution occurs within one year after the Effective Date, the maximum number of shares of Du Pont Common Stock which may be issued in the Contingent Share Distribution is 300,000 shares. If the Contingent Share Distribution occurs more than one year after the Effective Date, the maximum number of Principal Shares which may be issued as part of the Contingent Share Distribution is 300,000 shares. The maximum number of shares of Du Pont Common Stock referred to above shall be appropriately adjusted in the event of any division, combination or modification of Du Pont Common Stock, whether through recapitalization, stock split, stock dividend or otherwise. In the event that the maximum number of Principal Shares applies as the result of computing the number of Principal Shares under subparagraph (II), subparagraph (II) shall not apply to determine the number of Interest Shares to be

distributed and there shall be distributed as interest the lesser of (a) a number of Interest Shares equal to the number of Principal Shares multiplied by a factor equal to six percent per annum simple interest from the Effective Date to the date of distribution of the Contingent Share Distribution, or (b) the excess of the Contingent Share Distribution (determined without regard to this subparagraph) over the maximum number of Principal Shares.

(IV) All matters relating to prosecution and settlement of the Tax Claim and the Contingent Share Distribution shall be determined by a special Tax Claim Committee consisting of the members of the Board of Directors of Christiana as constituted on the Effective Date. If any vacancies shall occur among the members of the Tax Claim Committee, those remaining in office shall appoint replacements. The Tax Claim Committee shall have authority to the same extent as the board of directors of a corporation organized under the General Corporation Law of the State of Delaware.

(c) Except as provided in paragraph (e) of this Article Fifth, each share of Common Stock of Du Pont ($5.00 par value) issued and outstanding or held in treasury by Du Pont on the Effective Date shall remain unchanged and unaffected by the Merger.

(d) Except as provided in paragraph (e) of this Article Fifth, each share of any series of Preferred Stock of Du Pont issued and outstanding or held in treasury by Du Pont on the Effective Date shall remain unchanged and unaffected by the Merger.

(e) Each share of Common Stock ($5.00 par value) and $4.50 Series Cumulative Preferred Stock of Du Pont held by Christiana on the Effective Date and received by Du Pont in the Merger shall be forthwith retired and restored to the status of authorized and unissued shares, and the capital of Du Pont shall be automatically reduced by the aggregate amount of capital attributable on the Effective Date to—

1) the shares of Preferred Stock then retired, at the stated value thereof, and

2) the shares of Common Stock then retired, at par value thereof.

A Certificate of Reduction of Capital shall be filed pursuant to Section 244 of the General Corporation Law of the State of Delaware.

(f) Subject to the limitations of Article Sixth and to the provisions herein with respect to a Contingent Share Distribution, the conversion of the shares of Christiana capital stock pursuant to this Agreement of Merger shall be complete and effective on the Effective Date without regard to the date or dates upon which certificates representing shares of Christiana shall be surrendered by the holders thereof for certificates representing Du Pont Common Stock as hereinafter provided. Until so surrendered and subject to the limitations of Article Sixth, certificates for shares of Christiana Preferred Stock shall be deemed for all purposes from and after the Effective Date to evidence the ownership of the number of full shares of Du Pont Common Stock into which such shares of Christiana Preferred Stock shall have been converted as of the Effective Date as herein provided and certificates for

shares of Christiana Common Stock shall be deemed for all purposes from and after the Effective Date to evidence the ownership of the number of full shares of Du Pont Common Stock into which such shares of Christiana Common Stock shall have been converted by reason of the Effective Date Distribution. Subject to the limitations of Article Sixth, (i) upon surrender by any holder of certificates representing shares of Preferred Stock of Christiana, Du Pont shall issue certificates representing the full shares of Du Pont Common Stock to which such stockholder shall be entitled by reason of the conversion as of the Effective Date and the cash payment with respect thereto and (ii) upon surrender by any holder of certificates representing shares of Common Stock of Christiana, Du Pont shall issue certificates representing the full shares of Du Pont Common Stock to which such stockholder shall be entitled by reason of the Effective Date Distribution.

(g) No fractional shares of Du Pont Common Stock or certificate or scrip representing the same shall be issued in connection with the Merger. In lieu thereof each holder of Du Pont Common Stock having a fractional interest arising upon the Effective Date will be afforded the opportunity through the exchange agent for such stock, on or before the 40th day following the Effective Date, either to consolidate his fractional interest into one full share of such stock by purchasing and paying for the additional fractional interest required for such consolidation, or to sell his fractional interest and obtain the proceeds thereof. Any fractional interest with respect to which instructions shall not have been received by the exchange agent within the prescribed period shall be sold. Buy-

ing and selling orders may be offset, but they will be exercised at prices determined by market transactions. The proceeds of any sale of a fractional interest shall be paid in cash by the exchange agent to the stockholder entitled to the fractional interest sold, except that the exchange agent shall not pay such proceeds to any such stockholder who shall not have surrendered his certificates for exchange pursuant to Article Sixth, and shall retain such proceeds until such time as such certificates have been so surrendered. The same procedure shall be utilized for the treatment of fractional interests arising out of any Contingent Share Distribution. The exchange agent shall be the agent of the stockholders entitled to such fractional share interests and shall act on behalf of such stockholders pursuant to instructions of Du Pont or the Tax Claim Committee, as the case may be.

(h) Notwithstanding the provisions of paragraph (a) of this Article Fifth, no share of Christiana Preferred Stock, the holder of which has, within the time periods specified in Section 262 of the General Corporation Law of the State of Delaware, objected to the Merger and made demand upon the Surviving Corporation for payment of the value of such share shall be deemed converted hereunder; provided, however, that any such share, the holder of which shall, with the approval of the Surviving Corporation, withdraw his objection to the Merger, shall be deemed converted hereunder as of the Effective Date.

Sixth. After the Effective Date, each holder of an outstanding certificate or certificates theretofore representing capital stock of Christiana shall surrender the same to an agent or agents designated by Du Pont (accompanied

by such instruments of transfer as Du Pont may reasonably require), and each holder shall upon such surrender receive in exchange therefor a certificate or certificates representing the shares of Du Pont Common Stock to which such stockholder is entitled on the Effective Date (excluding any shares to be distributed in any Contingent Share Distribution) by reason of the Merger together with any additional share which may have been purchased, or the proceeds of any fractional share sold pursuant to Article Fifth hereof, and, in the case of Christiana Preferred Stock, the cash payment. Until the surrender of a certificate or certificates evidencing the Christiana shares, any dividend or other distributions in respect of such shares of Du Pont Common Stock shall be accumulated and not paid or delivered, but at the time of such surrender, any such dividends or other distributions shall be paid or delivered in full but without interest thereon.

Seventh. Anything herein to the contrary notwithstanding, this Agreement of Merger may be terminated and the Merger may be abandoned at any time prior to the Effective Date:

(a) by mutual agreement evidenced by resolutions of the Boards of Directors of the parties hereto; and

(b) by either party hereto if any condition precedent to its obligation under an Agreement and Plan of Reorganization between the parties dated ...., 1972, is not met.

IN WITNESS WHEREOF, this Agreement has been executed by each of the Constituent Corporations, by its Chairman of the Board or its President or a Senior Vice President or a Vice President and attested by the Secretary

or an Assistant Secretary of each of the Constituent Corporations under its corporate seal, all on the date first above written.

[CORPORATE SEAL] CHRISTIANA SECURITIES COMPANY

Attest:

..... By .....
Secretary [*Title*]

[CORPORATE SEAL] E. I. DU PONT DE NEMOURS AND COMPANY

Attest:

..... By .....
Secretary [*Title*]

Exhibit C, pp. 15-19

CHRISTIANA SECURITIES COMPANY

STATEMENT OF INCOME

(Dollars in thousands, except per share)

	Six Months Ended June 30		*Years Ended December 31*				
	1972	*1971 (Unaudited) (Note 4)*	*1971*	*1970*	*1969*	*1968*	*1967*
INCOME:							
Cash dividends:							
E. I. du Pont de Nemours and Company:							
Common	$33,542.8	$33,542.8	$67,085.6	$67,085.6	$70,439.9	$73,794.2	$67,085.6
Preferred	36.6	36.6	73.2	73.2	73.2	73.2	73.2
Wilmington Trust Company, common	69.2	69.2	183.4	183.4	183.4	166.1	155.7
The News-Journal Company, common			238.7	238.7	238.7	238.7	238.7
Hercules Incorporated, common							150.0
Interest on commercial paper and certificates of deposit	91.2	79.6	216.8	274.0	538.4	444.9	355.9
Total income	33,739.8	33,728.2	67,797.7	67,854.9	71,473.6	74,717.1	68,059.1
EXPENSES:							
Relating to capital stock (transfer, dividend disbursement, etc.)	20.0	19.6	30.1	31.6	32.4	32.4	33.2
Salaries and employees' benefit plan expenses (less $33.9 life insurance proceeds in 1971)	25.8	(10.7)	10.8	47.4	45.9	43.5	41.0
Legal, auditing, and other fees	49.3	135.4	202.2	87.1	76.4	62.0	76.8
Franchise and payroll taxes	21.4	22.7	44.0	42.8	42.5	38.3	39.0
Rent	2.1	1.9	3.8	3.8	3.4	3.6	4.1
Miscellaneous	6.8	5.5	16.2	6.1	8.5	9.9	7.2
Total expenses	125.4	174.4	307.1	218.8	209.1	189.7	201.3
INCOME BEFORE FEDERAL INCOME TAX	33,614.4	33,553.8	67,490.6	67,636.1	71,264.5	74,527.4	67,857.8
Less—Provision for Federal Income Tax (Notes 1, 2 and 3)	2,383.4	2,400.0	4,850.0	5,003.5	5,775.2	5,985.9	4,839.9
NET INCOME FOR THE PERIOD	$31,231.0	$31,153.8	$62,640.6	$62,632.6	$65,489.3	$68,541.5	$63,017.9
EARNINGS PER SHARE OF COMMON STOCK (after preferred dividend)—based on average number of shares outstanding	$ 2.64	$ 2.63	$ 5.28	$ 5.28	$ 5.53	$ 5.79	$ 5.30
CASH DIVIDENDS PER SHARE:							
Common Stock	$ 2.50	$ 2.50	$ 5.25	$ 5.25	$ 5.50	$ 5.25	$ 5.25
Preferred Stock	$ 3.50	$ 3.50	$ 7.00	$ 7.00	$ 7.00	$ 7.00	$ 7.00
BOOK VALUE PER SHARE OF COMMON STOCK (assuming $120 a share call price of preferred)	$ 7.05						
ACCUMULATED NET REALIZED GAIN ON INVESTMENTS—See Note 5							
UNREALIZED APPRECIATION ON INVESTMENTS —See Note 3							

See accompanying notes to financial statements.

CHRISTIANA SECURITIES COMPANY

BALANCE SHEET
(Dollars in thousands)

ASSETS

	June 30, 1972	*December 31, 1971*
Cash in Banks–Demand Deposits	$ 1,077.8	$ 860.4
Certificate of Deposit (at cost and accrued interest, maturing in 1972)	5,210.5	
Commercial Paper (at cost and accrued interest, maturing in 1972)		3,911.0
Investments (Note 6):		
E. I. du Pont de Nemours and Company:		
Common–13,417,120 shares	74,621.9	74,621.9
Preferred, $4.50 cumulative–16,256 shares	1,298.1	1,298.1
Wilmington Trust Company, common–69,216 shares	903.6	903.6
The News-Journal Company (wholly-owned), common–7,460 shares	846.1	846.1
Total investments	77,669.7	77,669.7
Deferred Charge–Prior years' Federal income taxes and interest paid (Note 2)	11,723.0	11,723.0
Total	$95,681.0	$94,164.1

LIABILITIES

Accrued Expenses	$ 120.6	$ 186.6
Dividend on Preferred Stock–Payable July 1, 1972 and January 3, 1972, respectively	186.4	186.4
Accrued Federal Income Tax (Notes 1, 2 and 3):		
Estimated tax payable	2,400.0	4,850.0
Less amounts paid on declaration filed	(2,400.0)	(4,850.0)
Capital Stock and Surplus:		
Capital Stock:		
7% cumulative, nonvoting preferred–authorized and outstanding, 106,500 shares of $100 par value each (callable at $120 a share)	10,650.0	10,650.0
Common–authorized, 13,600,000 shares of $1.25 par value each; outstanding, 11,710,103 shares	14,637.6	14,637.6
Surplus:		
Undistributed net income	61,868.5	60,285.6
Accumulated net realized gain on investments (Note 5)	8,217.9	8,217.9
Total capital stock and surplus	95,374.0	93,791.1
Total	$95,681.0	$94,164.1

See accompanying notes to financial statements.

CHRISTIANA SECURITIES COMPANY

STATEMENT OF UNDISTRIBUTED NET INCOME
(Dollars in thousands)

	Six Months Ended June 30, 1972	*Years Ended December 31*		
		1971	*1970*	*1969*
Undistributed Net Income (beginning of period)	$60,285.6	$ 59,868.5	$ 59,459.4	$ 59,121.1
Add Net Income for the Period	31,231.0	62,640.6	62,632.6	65,489.3
Total	91,516.6	122,509.1	122,092.0	124,610.4
Deduct Cash Dividends:				
Preferred Stock	372.8	745.5	745.5	745.5
Common Stock	29,275.3	61,478.0	61,478.0	64,405.5
Total	29,648.1	62,223.5	62,223.5	65,151.0
Undistributed Net Income (end of period)	$61,868.5	$ 60,285.6	$ 59,868.5	$ 59,459.4

STATEMENT OF CHANGES IN FINANCIAL POSITION
(Dollars in thousands)

	Six Months Ended June 30, 1972	*Years Ended December 31*		
		1971	*1970*	*1969*
CASH BALANCE (beginning of period)	$ 860.4	$ 1,757.1	$ 1,534.3	$ 1,173.6
SOURCE OF FUNDS:				
Net income for the period	31,231.0	62,640.6	62,632.6	65,489.3
Add (deduct) items not requiring funds during the period:				
(Decrease) increase in accrued expenses	(66.0)	91.6	7.0	16.0
(Increase) decrease in accrued Interest income	.5	(5.4)	6.7	29.4
Net funds provided from operations	31,165.5	62,726.8	62,646.3	65,534.7
Commercial paper, etc. matured	16,800.0	17,600.0	39,100.0	115,400.0
Total	47,965.5	80,326.8	101,746.3	180,934.7
USE OF FUNDS:				
Payment of dividends	29,648.1	62,223.5	62,223.5	65,151.0
Purchase of commercial paper, etc.	18,100.0	19,000.0	39,300.0	103,700.0
Increase in deferred charge				11,723.0
Total	47,748.1	81,223.5	101,523.5	180,574.0
CASH BALANCE (end of period)	$ 1,077.8	$ 860.4	$ 1,757.1	$ 1,534.3

See accompanying notes to financial statements.

CHRISTIANA SECURITIES COMPANY

NOTES TO FINANCIAL STATEMENTS

(Dollars in thousands, except per share)

1. TAX STATUS

Christiana is not a "regulated investment company" as defined in Section 851 of the Internal Revenue Code, and is subject to Federal income tax at regular corporate rates. Under Delaware law, Christiana is not subject to state income tax.

2. DEFERRED CHARGE

Christiana filed suit in the United States District Court in Wilmington, Delaware, on December 23, 1969 for the refund of approximately $21 million in Federal income taxes and interest, of which taxes of $9,589.2 and related interest of $2,479.2 were paid as additional assessments in 1969 in connection with asserted deficiencies and which amounts, after tax adjustments, were charged to deferred accounts established in connection with the divestiture proceedings. This suit principally involves a controversy as to the fair market value for Federal income tax purposes of the very large blocks of General Motors common stock received by Christiana from Du Pont in 1962, 1964, and 1965. These blocks of stock were a part of the General Motors Company divestiture distribution and were subject to specific divestiture requirements under the 1962 antitrust decree in *U. S. vs. du Pont et al.* Also involved is a controversy, of lesser magnitude, as to the deductibility for Federal income tax purposes of certain expenses incurred in connection with the divestiture of General Motors stock pursuant to the decree.

In addition to the claim for refund of taxes and interest referred to above, Christiana is also claiming interest on whatever amount may be refunded.

3. UNREALIZED APPRECIATION ON INVESTMENTS

The following amounts for unrealized appreciation on investments are computed by subtracting the carrying values from the amounts obtained by multiplying the number of shares of the various investments by the respective quoted market prices at the indicated dates (except the appraised value of $24,260.0 for the investment in The News-Journal Company applied retroactively for all applicable periods—see Note 6) and without regard to any effect of such unrealized appreciation on future Federal income tax liability. The amounts so computed are not represented to be realizable values for blocks of shares of the magnitude held.

	June 30, 1972	*December 31, 1971*	*1970*	*1969*
Balance beginning of period	$1,895,819.5	$1,740,017.5	$1,359,258.0	$2,165,213.1
Balance end of period	2,150,851.6	1,895,819.5	1,740,017.5	1,359,258.0
Increase (decrease) during the period	$ 255,032.1	$ 155,802.0	$ 380,759.5	$ (805,955.1)

4. UNAUDITED FINANCIAL STATEMENT

In the opinion of Christiana, all adjustments, consisting only of normal recurring adjustments, necessary for a fair statement of the results of operations for the unaudited six month period ended June 30, 1971 have been made.

5. ACCUMULATED NET REALIZED GAIN ON INVESTMENTS AND CAPITAL SURPLUS

There has been no change in accumulated net realized gain on investments during the six months ended June 30, 1972 and the three years ended December 31, 1971. The balance at June 30, 1972 represents the remainder after

charges for distributions to stockholders prior to 1969 aggregating $195.2.

Distributions to stockholders made from capital surplus, all prior to 1969, have aggregated $25,498.2, and there is no balance of capital surplus at June 30, 1972.

6. Investments

The carrying value of each of the investments in capital stocks is the same as the basis for Federal income tax purposes.

The quoted market price per share of investments at June 30, 1972 and December 31, 1971 and the amounts obtained by multiplying such prices by the number of shares on those dates were as follows:

	June 30, 1972		*December 31, 1971*	
	Quoted Market Price Per Share	*Shares Owned Times Price Per Share*	*Quoted Market Price Per Share*	*Shares Owned Times Price Per Share*
E. I. du Pont de Nemours and Company:				
Common	$164.00	$2,200,407.7	$145.00	$1,945,482.4
Preferred	71.00	1,154.2	69.75	1,133.9
Wilmington Trust Company, common	39.00	2,699.4	37.75	2,612.9
The News-Journal Company, common	(a)	—	(a)	—

(a) There is no market quotation available. The News-Journal Company's accounts at June 30, 1972 and December 31, 1971 show net assets of that company of approximately $6,800.0. A recent appraisal of the estimated fair market value of Christiana's investment, by an expert in the newspaper field, was $24,260.0 on the basis of a cash sale of common stock.

The amounts computed as shown above are not represented to be either the aggregate quoted market or realizable values of the respective investments.

The financial statements of The News-Journal Company have not been consolidated with those of Christiana for the reason that the former is not an investment company. Individual statements for this company are not included herein, as it is not "significant" within the meaning of the term "significant subsidiary" as defined in the General Rules and Regulations under the Investment Company Act of 1940.

7. Net Asset Coverage and Net Asset Value

The following sets forth the net asset coverage per share of preferred stock and the net asset value per share of common stock outstanding at June 30, 1972 and December 31, 1971, computed as to the valuation of investment securities on the basis of multiplying the number of shares of the various investments by the respective quoted market prices per share at those dates (except for an aggregate of $24,260.0 for the investment in The News-Journal Company applied retroactively at both dates—see Note 6) and including such unrealized appreciation of investments without regard to any effect thereof on future Federal income tax liability:

	June 30, 1972	*December 31, 1971*
Net asset coverage per share of preferred stock, 106,500 shares outstanding	$21,091.32	$18,681.79
Net asset value per share of common stock, 11,710,103 shares outstanding:		
On basis of preferred stock having a liquidation value of $100 a share	$ 190.91	$ 169.00
On basis of preferred stock having a redemption value of $120 a share	$ 190.73	$ 168.81

8. Supplementary Profit and Loss Information

Supplementary profit and loss information is not presented separately as it is included in the accompanying financial statements and/or notes thereto.

Exhibit E

Data Concerning Directors

The Tabulation below shows remuneration for the year 1971 to directors of Du Pont, including the three highest-paid officers, who received more than $30,000 from Du Pont and its subsidiaries and to all directors and officers as a group (see Notes A and E). Payments for "C" Bonus "dividend units" are not included but are shown in Note A.

The Tabulation also shows shares of common stock of Du Pont and Christiana owned beneficially, directly or indirectly, as of December 31, 1971, by each of the directors of Du Pont and Christiana.

Directors of Du Pont

Directors	Remuneration for Year 1971 (See Notes A and E). Data do Not Include Any "C" Bonus "Dividend Unit" Payments Shown in Note A			Common Shares Owned Beneficially December 31, 1971 (See Note B)	
	Salary and Director's Fees	Bonus With Respect to Year 1971	Aggregate	Du Pont	Christiana
Walter J. Beadle	–	–	–	5,442	–
Walter S. Carpenter, Jr. (C)	–	–	–	16,040	50,000
W. Sam Carpenter, III (D)	$ 19,600	–	$ 19,600	6,306	18,113
Lammot du P. Copeland (C) (D)	32,890	–	32,890	195,737	75,198
Joseph A. Dallas	127,743	$ 69,000	196,743	1,018	–
David H. Dawson	126,450	69,000	195,450	2,411	–
Emile F. du Pont (D)	31,550	–	31,550	1,083	16,500
Irénée du Pont, Jr. (C) (D)	124,600	69,000	193,600	7,779	144,901
George P. Edmonds (C) (D)	–	–	–	4,300	3,500
Edwin A. Gee	124,913	69,000	193,913	519	–
Wallace E. Gordon	124,700	69,000	193,700	1,189	–
Crawford H. Greenewalt (C) (D)	61,000	–	61,000	11,079	37,713
Caryl P. Haskins	–	–	–	250	–
Robert L. Hershey	24,281	–	24,281	700	–
George E. Holbrook	31,250	–	31,250	1,635	–
Howard W. Johnson	–	–	–	100	–
Edward R. Kane	138,750	72,000	210,750	833	–
Wm. Winder Laird (D)	–	–	–	1,314	11,795
Samuel Lenher	1,000	–	1,000	150	4,299
Charles B. McCoy	192,600	80,000	272,600	3,481	40
Bernard Peyton	–	–	–	150,311	500
R. Russell Pippin	13,019	–	13,019	1,279	–
Robert L. Richards	28,650	–	28,650	1,206	240
Irving S. Shapiro	124,913	69,000	193,913	530	–
Hugh R. Sharp, Jr. (D)	31,450	–	31,450	1,854	244,108
Lester S. Sinness	127,664	69,000	196,664	1,078	–
29 Directors and officers of Du Pont as a group	$1,744,753	$768,700	$2,513,453	–	–

Directors of Christiana Who Are Not Directors of Du Pont

Names	Shares of Stock Owned Beneficially Directly or Indirectly, December 31, 1971, in Christiana and Du Pont (See Note B)			
	Christiana		Du Pont	
	Common	7% Cumulative Preferred	Common	Preferred $4.50
Robert R. M. Carpenter, Jr. (B) (F)	1,927	–	–	–
Ellason Downs (B) (F)	–	–	–	–
A. Felix du Pont, Jr. (B)(F)	137,554	–	16,466	–
Edward B. du Pont (B) (F) (G)	100,013	–	100	–
S. Hallock du Pont (B) (F)	119,150	–	12,932	–
Bayard Sharp (B) (F)	268,585	–	1,575	–

Notes to Tabulation

(Much of the information contained in the Tabulation and its notes was obtained from the directors.)

(A) Du Pont has three Bonus Plans, "A", "B" and "C" whose purposes are (a) to provide greater incentive for employees continually to exert their best efforts on behalf of the Company by rewarding them for services rendered with compensation that varies with the success of the business; (b) to attract to and retain in the employ of the Company persons of outstanding competence; and (c) to further the identity of interests of such employees with those of the Company's stockholders generally. Under Plan "A" awards may be granted for conspicuous service of any nature regardless of the amount of the Company's earnings. Under Plan "B", awards may be granted to employees, including those who are officers or directors of the Company, and members of standing committees of the Board of Directors, who have contributed most in a general way to the Company's success by their ability, efficiency and loyalty. Under Plan "C", awards may be granted to employees in important managerial or other responsible positions who concurrently are, or otherwise would be, recommended for awards under Plan "B". The maximum amount which can be made available for Plan "B" awards and the extent to which substitute awards can be made under Plan "C" are dependent upon earnings of the Company, as defined in the Plans.

Awards under Plan "A" totaling $609,185 were granted in May 1971 to 159 employees, none of whom were directors or officers, and consisted of $221,297 in cash and 2,689 shares of Du Pont common stock acquired by the Company and awarded at $144.25 a share.

Stock to be delivered in payment of awards is registered in the names of beneficiaries at the time of delivery. With respect to awarded but undelivered stock, on dividend payment dates the Company will pay to bonus beneficiaries an amount equal to the value of the diviends that would have been paid to them on such stock had it been delivered.

Awards for the year 1971 under Plan "B" totaling $35,120,000 have been granted in 1972 to 13 employees who were directors or officers during 1971 and to 11,424 other employees in the respective amounts of $768,700 and $34,351,300. Of the total amount, $18,094,217 was awarded in cash and the balance in 114,267 shares of new common stock of the Company to be issued directly to the beneficiaries at the award value of $149.00 per share. This value was fixed by the Board of Directors on January 17, 1972, and corresponds closely to the price on the preceding market day. The amount of bonus shown for 29 directors and officers of Du Pont as a group includes the award value of 142 shares of new common stock awarded under Plan "B".

Awards under Plan "B" with respect to the year 1971 are deliverable in four equal annual installments. Common stock to be delivered in payment of awards is issued or registered in the names of beneficiaries at the time of delivery. With respect to awarded but undelivered stock, on dividend payment dates the Company will pay to bonus beneficiaries an amount equal to the value of the dividends that would have been paid to them on such stock had it been delivered. No part or amount of bonus delivered to directors and officers during 1971 representing bonus awards with respect to prior years is included in the figures shown for the year 1971.

Awards under Plan "C" for the year 1971 were granted on February 21, 1972, in substitution for awards which otherwise would have been made under Plan "B", to 10 employees who were directors or officers during 1971 and to 39 other employees. The awards consisted of—

(a) 6,015 "dividend units"

(b) 15,030 "dividend units" accompanied by stock options to purchase 20,040 shares of the Company's common stock at $161.00 per share (market price on date of option grant). Each option becomes exercisable for 50% of the number of shares after January 1, 1973, with one half of the balance of the option becoming exercisable after January 1, 1974, and the other half after January 1, 1975. The options have a five-year maximum life and other terms and conditions conforming with the provisions of the Internal Revenue Code.

Each "dividend unit" entitles the holder to receive, for a limited term, cash payments from the Company equal to the interim and year-end dividends (other than stock dividends) paid on one share of common stock of the Company.

"Dividend units" granted for 1971 are forfeitable under certain circumstances throughout the beneficiary's active employment and for one year after his retirement; they cannot be transferred or assigned during the beneficiary's lifetime. "Dividend units" awarded in conjunction with a stock option terminate proportionately as such option is exercised. Except in the case of forfeiture, "dividend units" not terminated as a result of the exercise of a stock option, and "dividend units" not accompanied by a stock option, remain in effect until the death of the beneficiary or the 85th anniversary of his birth, whichever is later.

Plan "C" awards granted for the year 1971, and other pertinent data with respect to options and "dividend units" outstanding and payments thereunder, to those directors (including three highest-paid officers) who received more than $30,000 from Du Pont and its subsidiaries for 1971, and to directors and officers as a group, are shown below:

	Plan "C" awards granted February 21, 1972 for the year 1971				*Shares under option at December 31, 1971 (2)*	
Name	*Number of "dividend units" awarded*	*Number of shares for which options were granted at $161.00 per share*	*Number of "dividend units" in effect at December 31, 1971*	*Amounts received in 1971 under "dividend units" (1)*	*Number of shares*	*Average per share option price*
W. S. Carpenter, III ..	–	–	7,194	$ 35,970	–	–
L. du P. Copeland ..	–	–	17,121	85,605	–	–
J. A. Dallas	954	1,272	5,712	28,560	7,236	$133.72
D. H. Dawson	954	–	16,237	81,185	8,196	138.63
E. F. du Pont	–	–	4,550	22,750	–	–
I. du Pont, Jr.	954	–	5,607	28,035	6,088	132.53
E. A. Gee	954	1,272	4,507	22,535	5,128	138.90
W. E. Gordon	954	–	13,206	66,030	6,972	173.30
C. H. Greenewalt ..	–	–	10,637	53,185	–	–
R. L. Hershey	–	–	12,908	64,540	–	–
G. E. Holbrook	–	–	18,389	91,945	–	–
E. R. Kane	1,287	1,716	4,080	20,400	5,440	126.64
S. Lenher	–	–	15,153	75,765	–	–
C. B. McCoy	2,031	–	21,539	107,695	16,272	135.15
R. R. Pippin	–	–	15,083	75,415	–	–
R. L. Richards	–	–	7,484	37,420	–	–
I. S. Shapiro	954	1,272	1,101	5,505	1,368	136.66
L. S. Sinness	954	–	15,074	75,370	11,176	154.26
Directors and officers as a group	10,527	6,240	200,621	$1,003,105	70,900	$141.25

(1) These amounts, which represent payments under awards for years prior to 1971, are not included in remuneration data shown in the Tabulation concerning "Directors of Du Pont".

(2) No stock options were exercised by directors or officers in 1971.

(B) The number of shares of Du Pont common stock listed does not include unissued and undelivered "B" Bonus shares since an award in stock of the Company does not vest in the beneficiary any interest in such shares until time of delivery.

In addition, other issues were beneficially owned by directors as follows: Du Pont preferred stock $4.50 series shares by Walter S. Carpenter, Jr., 17; Emile F. du Pont, 15; Irénée du Pont, Jr., 2,137; Christiana 7% cumulative preferred shares by Walter S. Carpenter, Jr., 13; Irénée du Pont, Jr., 251; Wm. Winder Laird, 50; Remington Arms Company, Inc. (a subsidiary) common shares by Joseph A. Dallas, 200; David H. Dawson, 100; Charles B. McCoy, 200.

The Tabulation includes, in some instances, shares in which members of the director's immediate family have a beneficial interest. These shares are reported because of the Securities and Exchange Commission's interpretation of beneficial ownership. The directors disclaim beneficial ownership of any such shares.

In addition to the shares shown in the Tabulation, members of W. Sam Carpenter, III's immediate family have a beneficial interest in 47,872 shares of the common stock and 271 shares of the preferred stock—$4.50 series of Du Pont and 6,470 shares of the common stock of Christiana. Mr. Carpenter disclaims beneficial ownership of these shares.

In addition to the shares shown in the Tabulation, members of Lammot du P. Copeland's immediate family have a beneficial interest in 110,199 shares of the common stock of Du Pont and 66,337 shares of the common stock of Christiana. Mr. Copeland disclaims beneficial ownership of these shares.

In addition to the shares shown in the Tabulation, Irénée du Pont, Jr. is a co-trustee of trusts in which members of his immediate family have a beneficial interest. These trusts hold 20,570 shares of the common stock of Du Pont and 42,887 shares of the common stock of Christiana. Members of Mr. du Pont's immediate family also have a beneficial interest in 3,700 shares of the common stock of Du Pont, and 40,628 shares of the common stock of Christiana. Mr. du Pont disclaims beneficial ownership of these shares.

In addition to the shares shown in the Tabulation, members of George P. Edmonds' immediate family have a beneficial interest in 7,721 shares of the common stock of Du Pont and 131,579 shares of the common stock of Christiana. Mr. Edmonds disclaims beneficial ownership of these shares.

In addition to the shares shown in the Tabulation, Crawford H. Greenewalt is an income beneficiary for life in a trust that holds 6,010 shares of the common stock of Christiana. Also, members of Mr. Greenewalt's immediate family have a beneficial interest in 2,886 shares of the common stock and 188 shares of the preferred stock—$4.50 series of Du Pont and 73,930 shares of the common stock and 1,486 shares of the 7% cumulative preferred stock of Christiana. Mr. Greenewalt disclaims beneficial ownership of these shares.

In addition to the shares shown in the Tabulation, R. R. M. Carpenter, Jr., is an income beneficiary for life in 56,922 shares of Christiana common stock held in two trusts, and in one-fourth of the income of a third trust which holds 305,307 shares of Christiana common stock. Members of Mr. Carpenter's immediate family also have a beneficial interest in 4,000 shares of the common stock of Christiana. Mr. Carpenter disclaims beneficial ownership of these shares.

Members of Ellason Downs' immediate family have a beneficial interest in 150,849 shares of the common stock of Christiana and 4,800 shares of the common stock of Du Pont. Mr. Downs disclaims beneficial ownership of these shares.

In addition to the shares shown in the Tabulation, S. Hallock du Pont is a beneficiary for life in part of the income of a trust which holds 48,650 shares of the common stock of Du Pont. Members of Mr. du Pont's immediate family have a beneficial interest in 20,307 shares of the common stock and 75 shares of the 7% cumulative preferred stock of Christiana and 2,000 shares of the common stock of Du Pont. Mr. du Pont disclaims beneficial ownership of these shares.

In addition to the shares shown in the Tabulation, members of A. Felix du Pont, Jr.'s immediate family have a beneficial interest in 21,223 shares of the common stock of Christiana and 3,374 shares of the common stock of Du Pont. Mr. du Pont disclaims beneficial ownership of these shares.

In addition to the shares shown in the Tabulation, members of Edward B. du Pont's immediate family have a beneficial interest in 30,129 shares of the common stock of Christiana.

In addition to the shares shown in the Tabulation, Bayard Sharp is an income beneficiary for life in a trust which holds 7,000 shares of the common stock of Christiana. He also has a contingent interest in a separate trust which holds 500 shares of the common stock of Du Pont. Members of Mr. Sharp's immediate family have a beneficial interest in 600 shares of the common stock of Du Pont. Mr. Sharp disclaims beneficial ownership of these shares.

In addition to the shares shown in the Tabulation, members of Hugh R. Sharp, Jr.'s immediate family have a beneficial interest in 3,976 shares of the common stock of Du Pont and 3,920 shares of the common stock of Christiana. Mr. Sharp disclaims beneficial ownership of these shares.

(C) These directors are also directors of Christiana.

(D) These directors of Du Pont are all "associates" according to the regulations of the Securities and Exchange Commission. This group also has other individual and corporate "associates" which held in the aggregate as of December 31, 1971, the following securities:

Company	*Shares*
E. I. du Pont de Nemours and Company—common	13,649,540(1)
E. I. du Pont de Nemours and Company—preferred $4.50 series	18,241
Christiana Securities Company—common	2,499,519
Christiana Securities Company—7% cumulative preferred	279

(1) This total includes 13,417,120 shares (28.3%) of Du Pont common stock owned by Christiana.

(E) The following tabulation shows the estimated annual pension payable by Du Pont to an employee, including any employee who is a director or officer, upon retirement with full pension after selected periods of service under the Pension and Retirement Plan:

Average Pay, Exclusive of Bonus, During 5 Years of	*Estimated Annual Pension Payable by the Company Based on Service of:*			
Highest Pay	*25 years*	*30 years*	*35 years*	*40 years*
$ 5,000(1)	$ 1,700	$ 1,940	$ 2,180	$ 2,420
10,000	2,750	3,300	3,850	4,400
25,000	6,875	8,250	9,625	11,000
50,000	13,750	16,500	19,250	22,000
75,000	20,625	24,750	28,875	33,000
150,000	41,250	49,500	57,750	66,000
250,000	68,750	82,500	96,250	110,000

(1) Benefits illustrated at this pay level are calculated under the minimum formula.

(F) Directors of Christiana are all "associates" according to the regulations of the Securities and Exchange Commission. This group also has other individual and corporate "associates" which held in the aggregate as of December 31, 1971, the following securities:

Company	*Shares*
Christiana Securities Company—common	1,832,820
Christiana Securities Company—7% cumulative preferred	2,353
E. I. du Pont de Nemours and Company—common	319,117
E. I. du Pont de Nemours and Company—preferred $4.50 series	286

(G) Edward B. du Pont, a director and stockholder of Atlantic Aviation Corporation, is a relative, under Securities and Exchange Commission concepts, of certain directors of Du Pont and Christiana. During 1971, Atlantic and its subsidiaries had sales to Du Pont and its subsidiaries totaling about $1,400,000, involving airplane charter service, and the maintenance, operation and storage of Du Pont's own planes.

CHRISTIANA EXHIBIT NO. 1.

June 6, 1972

Kidder, Peabody & Co. Incorporated
10 Hanover Square
New York, New York 10005

Gentlemen:

The Board of Directors of Christiana Securities Company has appointed a committee to consider the advisability of a possible merger of Christiana and E. I. du Pont de Nemours and Company, and to negotiate any proposed terms of such a merger with a committee appointed by the Du Pont Company Board. We request that you act as adviser to the Committee appointed by the Christiana Board.

You are requested to render a report to the Christiana committee, based upon a financial analysis and evaluation and taking into consideration all material factors you believe to be relevant, of the range of ratios of exchange of Christiana Common Stock for Du Pont Common Stock in such a merger, and your recommendations as to terms for exchange of Christiana Preferred Stock, which you consider fair and reasonable to Christiana and the shareholders of Christiana.

We understand that you will undertake the study necessary to prepare a preliminary report and recommendation with a view to furnishing such material by June 20, 1972. Your final report which will be accompanied by your opinion as to the reasonableness and fairness of the transaction should be submitted to the committee no later than June 30, 1972.

We expect that your opinion will be referred to in a proxy statement that will be sent to the stockholders of

both companies and in an application that will be filed with the Securities and Exchange Commission under Section 17 of the Investment Company Act of 1940.

If you are willing to accept this assignment, please sign and return the two copies of this letter to the undersigned.

Very truly yours,

Special Committee of the
Board of Directors
CHRISTIANA SECURITIES COMPANY

The foregoing assignment
is hereby accepted.
KIDDER, PEABODY & CO. INCORPORATED

CHRISTIANA EXHIBIT NO. 2
(exclusive of exhibits)

[Letterhead of]

KIDDER, PEABODY & CO.
INCORPORATED

10 HANOVER SQUARE
NEW YORK, N. Y. 10005

CONFIDENTIAL

July 7, 1972

REPORT TO THE SPECIAL COMMITTEE
OF THE BOARD OF DIRECTORS
CHRISTIANA SECURITIES COMPANY
CONCERNING A POSSIBLE MERGER WITH
E. I. DU PONT DE NEMOURS AND COMPANY

The purpose of this report is to present our recommendations as to an appropriate range of exchange ratios between the Common shareholders in the proposed merger and as to an offer we would consider fair to the holders of Christiana's 7% Preferred Stock. The recommendations presented herein are based upon a financial analysis and evaluation of all factors which we believe to be relevant. While this report does not purport to demonstrate the full range of our considerations and investigation, we have presented herein the relevant arguments which support our conclusions and are prepared to discuss the entire detailed analysis or any part thereof.

Recommendations

We have recommended as a starting point for negotiations between the Parties, a ratio of exchange between the Common shareholders in a merger of the Christiana Securities Company ("Christiana") and E. I. du Pont de Nemours and Company ("Du Pont"), under which the Christiana shareholder will receive the underlying Net Asset Value of his shares, as further defined herein, in Du Pont Common Stock valued at a closing market value at a date or dates proximate to the closing of the merger, (the "Valuation Date"). In our opinion, such an exchange ratio can range from a recognition of 2.0% premium over the Net Asset Value of Christiana to a recognition of a 3.0% discount without constituting an unfair offer to the Christiana shareholder. Such a range exists because different persons might place different weights on the factors discussed herein. We further recommend that the Christiana Preferred Shareholders receive an amount of Du Pont Common Stock, valued on the same date, equal to $120 per Preferred Share, plus any accrued dividends.

Net Asset Value, as used herein, incorporates certain additional underlying recommendations by us as to the valuation of Christiana's assets. We define this term to mean:

(i) Christiana's cash and short-term investments less liabilities as of the Valuation Date; plus

(ii) Christiana's holdings in Du Pont Common stock, $4.50 Preferred stock and Wilmington Trust Company Common stock at their closing market values as of the Valuation Date; plus

(iii) an independent appraiser's value of $24,250,000, less capital gains taxes for the News-Journal Company; plus

(iv) a value of 0 (zero) for Christiana's Federal tax claim; less

(v) Christiana's expenses relating to this merger and one-half of any joint expenses; and less

(vi) the number of Christiana 7% Preferred shares outstanding on the Valuation Date times $120.

For the purposes of our analysis and comparisons we have used closing market prices on April 28, 1972 in lieu of the Valuation Date. The resulting Net Asset Value and exchange ratio as of that date are shown in Exhibit 1.

We are of the opinion that our recommendations yield terms which are fair and reasonable and do not involve overreaching on the part of any person concerned. We believe that our recommendations are so structured as to be free of market forces during the intervening period until a merger be consummated, which might otherwise distort the underlying relationships.

Assumptions

Our recommendations are based, among other things, upon a number of assumptions. Those which relate to a specific argument or conclusion are included in the appropriate text which follows, while the more general assumptions are cited in Exhibit 2.

Approach

We have viewed the development of our recommendations as consisting of two separate tasks: the determination of a fair exchange formula, and the valuation of the items to be exchanged. We have followed three approaches to develop our recommended exchange formula and our report is organized accordingly. These approaches are comprised of an examination of the facts of the immediate situation to deduce a fair arrangement, an

examination of similar cases to discern the dictates of precedence, and an exploration of certain pragmatic considerations which appear to bear heavily on the contemplated merger. We have also relied on these three types of considerations, where appropriate, to develop our valuation recommendations and suggested terms for treatment of the Christiana Preferred stock.

I. Determination of a Fair Exchange Formula

Our first approach requires an examination of various financial and non-financial factors to establish those which are material and useful in determining the relative values possessed by the parties to the transaction. Typically, these include financial factors such as earnings, dividends, book values and market values along with non-financial factors which bear on the relative future prospects of the merger partners. The nature of Christiana is such that we have also considered Net Asset Values. There follows a summary of our judgment as to the utility of each of these factors in deriving an exchange formula.

Non-Financial Factors—In a "going-concern" merger between two unrelated companies, we would make a substantial review of non-financial factors. These typically include considerations such as relative rates of growth, market position, industry outlook, etc., which may influence the relative future prospects of the companies, and thus their relative present values. In the case of Christiana and Du Pont, however, we do not believe that such an examination is necessary, since Christiana's assets consist almost entirely of Du Pont Common stock. This being the case, the fundamental risks and rewards to the stockholders of either company are essentially identical and of little use in evaluating the exchange.

Earnings—Substantially all of Christiana's revenues are derived from the dividends on its Du Pont stock holdings. After deduction of minor operating expenses and taxes, which together accounted for approximately 7.5% of total revenue in 1971, these dividends constitute Christiana's reported income. Since Du Pont, in turn, has maintained an earnings pay-out ratio in the 69%-75% range in the last five years, and reduced its dividend to do so in 1969 and 1970, it is obvious that Christiana's year-to-year reported earnings depend heavily on those of Du Pont and are fundamentally dependent upon them in any case. Further, we do not consider earnings a good measure of the value or performance of passive investment companies such as Christiana which do not seek to improve their performance by redeploying investments. We therefore believe that comparative reported company earnings are not an important consideration in this merger.

If the merger be consummated on any reasonable terms, there will be a large increase in reported earnings per former Christiana share on a pro forma basis. This increase is largely apparent for it arises from the fact that Christiana's accounting system does not recognize its ratable share of the increase in Du Pont equity resulting from earnings retention. Restating the pro forma comparison on this basis shows that there can be a minor real increase in earnings per former Christiana share with certain exchange ratios and a corollary minor dilution in reported earnings per Du Pont share. This dilution is also not real, as shown in subsequent paragraphs. These changes in reported earnings per share arise from a combination of minor structural and economic factors which include the elimination of the 1971 7.2% tax rate on Christiana's income, Christiana's non-recognition of its increase in the equity of the News-Journal Company, the issuance by Du Pont of different amounts of shares than

are received from Christiana, and low historical earnings from Christiana's ancillary assets, among others. However, we do not consider these changes relevant to the determination of a fair exchange formula for reasons which include those cited above. In addition, these changes are a result of the pro forma combination of historical results which are not representative of the likely utilization of Christiana's assets. In our opinion, discussed more fully in another subsequent section, there will not be a dilution of Du Pont future reported earnings per share under any reasonable exchange formula—in fact there will probably be an incremental benefit—when viewed in a manner reflecting the likely actual utilization of Christiana's assets.

Dividends—Under any reasonable exchange ratio, a former Christiana shareholder would have received an increase in dividends, on a pro forma historical basis. However, for the reasons cited in the foregoing paragraph and the fact that these historical restatements are a function of assumptions on dividend policy which may be subject to change upon the dissolution of Christiana, among other things, we do not believe that comparative dividends are useful measures of value in this situation.

Market Values—Typically, we would consider market values as highly determinative of relative values because we believe they would incorporate other financial and non-financial factors. We do take this posture with respect to the Du Pont common stock which is listed, is widely followed, and appears reasonably priced when compared to other somewhat similar concerns.

Christiana's common stock typically sells in the over-the-counter market at a substantial discount from its underlying asset value. This is usual for a closed-end investment company. Explanations of such discounts generally include the presence of unrealized capital gains liabilities, the thin markets of such securities, the Federal income tax

on inter-corporate dividends and a lack of investor familiarity with closed-end investment companies. While we do not believe that the capital gains liability is a major consideration for most Christiana investors, we cannot conclude that Christiana's current market price is unrealistic in terms of its long-term historical relationship with Du Pont's market price or the experience of the few closed-end investment companies which might be considered as somewhat comparable to Christiana.

We do reject the market price as a useful measure of value to the Christiana stockholder in this merger evaluation. First, the market price reflects a going-concern assessment of the security, whereas Christiana will cease to exist after this merger. In addition, there are other means by which the Christiana stockholder can realize a value approximating the underlying Net Asset Value of his holding. These are: (i) a merger with an alternate partner, and (ii) an optional stock dividend open-market purchase plan. Since each of these other arrangements yields a value considerably higher than the current market, and are available to Christiana acting alone, we do not believe that the market value of Christiana stock merits further consideration.

We have been informed that counsel is not aware of any plans to register and sell Du Pont stock on the part of any Christiana holder, and thus do not anticipate any impact to the Du Pont stock from this quarter. While the merger will also involve substantial quantities of unrestricted Du Pont stock, we do not foresee a market depression from this stock. Christiana shareholders do not appear to be oriented to profit-taking, evidenced by the fact that the substantial post-announcement price rise caused by arbitrage of the two securities did not occasion any significant additional Christiana volume.

Furthermore, we believe that there is a possibility that the Du Pont stock may be favorably influenced by the consummation of the merger due to the major increase in the publicly available supply, the dispersion of the overhanging block, and the elimination of Christiana's potential control of the company. These factors lead us to believe that the transaction's market impact is indeterminate at worst and more likely to be favorable than otherwise. Even in the event that an adverse influence did result, the major portion of such an impact will come from investor anticipation upon the announcement of terms, well before the closing. Our recommendation is structured so that any such impact would not affect the relative positions of either party.

Book Value—The contemplated merger will provide a substantial increase in book value per former Christiana share, and a minor dilution per Du Pont share, because of the low Christiana book value resulting from its policy of paying out almost all its earnings and the low cost of its Du Pont stock. The book values result from accounting conventions which do not purport to measure going-concern or dissolution values, as is illustrated by the fact that Christiana's book value approximates a single year's dividend payment. We do not consider relative book values or changes therein determinative concepts in establishing an equitable exchange formula.

Net Asset Value—Net Asset Value, as defined in an earlier paragraph, is not a useful concept for measuring the going-concern value of an operating company such as Du Pont for much the same reasons as is the case with its book value. However, in our opinion, it is the relevant measure of value for Christiana in the analysis of this merger. Psychologically, we believe that it is the value the Christiana stockholder perceives himself as holding, although there

may be structural impediments which prevent him from realizing it as Christiana is currently constituted. Furthermore, there are other alternatives by which Christiana can approximate this value for its shareholders acting on its own.

The first alternative available to Christiana is to solicit a merger partner in the form of an operating company or another investment company. The business, financial and legal difficulties are admittedly large and the time horizon extended. However, the possible interest of an aggressive management in an unrelated industry, a foreign company or other investment companies must bear some weight in the face of numerous examples of successful tenders for large companies by aggressive smaller concerns, instances of foreign control of major American businesses, and mergers of large investment companies.

Another alternative is one whereby Christiana would establish an optional plan for the payment of cash dividends to a trustee in lieu of a stockholder, similar to the plans presently offered by at least two other closed-end investment companies. Acting on behalf of the stockholder (who remains liable for taxes on the dividends), the trustee converts the cash dividend to a stock dividend through purchases on the open market when the stock is selling at a discount, and purchases from the company at Net Asset Value otherwise. In addition to certain other benefits to the stockholder, we believe that such a plan would tend to eliminate the discount from the Christiana market price over a period of time; both from the presence of the trustee in the market and buying in anticipation of the plan.

It is obvious that such a dividend plan would not be accepted by all Christiana stockholders. However, the two plans we are aware of enjoyed participations in excess of

50% in 1971, notwithstanding the fact that one company has a growth and income orientation similar to Christiana and initiated its repurchase plan many years after its incorporation. If an equivalent number of Christiana shareholders were to elect such a plan, the trustee would more than double Christiana's average daily volume since January 1, 1972, on a continuing basis. Particularly in light of the recently demonstrated price insensitivity of normal Christiana volume, it is our judgment that such a plan could significantly reduce, if not eliminate, the market discount over a period of time.

Christiana also has the alternative of distributing its assets to its shareholders. A general liquidation, however, would be prohibitively expensive because of the tax implications. We have also considered special forms of liquidation. One of these is a plan such as that used by G. M. Shares wherein the stock of a closed-end investment company was redeemed at Net Asset Value in stock from the investment company holdings. We have been advised that such a plan is no longer economically viable for Christiana because it could not distribute Du Pont stock without recognizing the inherent capital gain.

We have also considered the alternative of a Section 333 "one-month" liquidation which virtually duplicates the results of this merger for the Christiana shareholder. We are informed by counsel that, given an 80% shareholder election, Christiana could liquidate and distribute its assets to its shareholders who would then be taxed to the extent of their ratable share of Christiana's "accumulated earnings and profits" as defined by the Internal Revenue Code. However, we have also received an opinion from counsel indicating that the Federal income tax cost of this alternative cannot be determined at this time and that it does not constitute a viable alternative.

Given the existence of these alternative means for approximating their Net Asset Value, it is our opinion that this is the relevant measure of value for the Christiana stock.

Financial Impact

The foregoing paragraphs indicate the rationale for our recommendation of an exchange of Du Pont shares valued at market for Christiana shares at their underlying Net Asset Value as a starting point for negotiations. Accepting, for the moment, our recommendations as to asset valuation, the equity in such an exchange is demonstrable.

An examination of the salient financial factors which would have resulted from a pro forma restatement of 1971 results based upon an exchange accomplished by our recommended formula on April 28, 1972, and at the extremes of the range which we consider fair, shows that earnings are the only changes shown which might be deemed relevant.

There is a dilution of reported pro forma earnings of less than 0.5% for Du Pont, and an apparent pro forma increase of 59.3% over Christiana's reported 1971 earnings in the recommended Net Asset Value exchange. This reduces to approximately 5.6% when Christiana's ratable share of the increase in Du Pont's equity is considered and would reduce further if the News-Journal were considered on the same basis.

The dilution to Du Pont has the appearance of a disadvantage, and results from exchanging an increment of 153,616 shares more than those it will cancel upon receipt from Christiana. These are exchanged in return for Christiana's net cash and ancillary assets. These assets, as they were employed by Christiana, did not earn a sufficient amount to overcome their dilutive effect in a pro forma

historical combination of reported earnings. However, it is our understanding that the majority of these assets will be redeployed once assumed by Du Pont and we have concluded that they will be a contribution to the Du Pont stockholders earnings in that more realistic context.

Exhibit 3 provides an analysis of the earnings contribution from the exchange of these incremental assets and shares. The calculation clearly shows the source of the dilution if the assets are assumed to contribute to Du Pont earnings in the same manner in which they contributed to Christiana's. If, however, one assumes a sale and redeployment of these assets, after capital gains taxes, their employment in an almost riskless 5% return is more than sufficient to offset their dilutive pro forma effect. In fact, if employed at a return approximating Du Pont's 1971 return on equity, they would contribute $19.90 per incremental share or 271% of Du Pont's reported actual 1971 earnings per share. If employed at the 15% return on 1971 year end equity implied by a 1972 "street estimate" of $8.50 for Du Pont, they would contribute $24.67 per share or 283% of the estimated earnings value. In our opinion, this incremental approach is more representative of the actual post-merger earnings potential of the combined companies than the pro forma recasting of historical results. It demonstrates a potential financial advantage available to Du Pont from the merger. In any case, Du Pont could employ the funds realized to repurchase essentially the same number of shares in the open market. On this basis there would be no dilution from a Net Asset Value exchange.

Conclusion from this Approach

We have shown that our recommended starting point for negotiations can result in certain financial advantages to both parties. Our opinion of its fairness comes from

consideration of all of the advantages and disadvantages to both parties. We have summarized our assessment of these on Exhibit 4.

On balance, it is our judgment that these factors are in a proper relationship. It is clear that the major advantage received is the realization of underlying asset value by the Christiana shareholder. However, it is equally clear that there are alternative means by which he can realize a significant portion of this value without the participation of Du Pont and thus the advantage cannot be construed to be consideration given by Du Pont. Furthermore, in return for the minor increase in value above that which he can realize on his own, Christiana is offering a controlled dispersion of the only large block of Du Pont common existing. In our judgment, this block is sufficient to control Du Pont should Christiana care to exercise it, and would be prohibitively expensive to reassemble once dispersed. We cannot, however, impute a large premium over Net Asset Value for this disadvantage to Christiana. We believe that the advantage to Du Pont lies in control of the dispersion, rather than the dispersion itself which Du Pont would also realize as an incidental benefit of at least one of Christiana's alternatives to the merger.

We believe that equity is achieved for Du Pont in a Net Asset Value exchange. While the tangible advantages are not as large, this is often the case in merging concerns of different scale and the intangible benefits such as improvement of its corporate image could be substantial. Furthermore, they cannot be realized without the cooperation of Christiana. There is also a possible financial advantage to Du Pont in terms of earnings on the marginal shares it will issue and in our judgment, there are no significant disadvantages. Thus, particularly when viewed in terms of the actual new shares Du Pont must issue at

Net Asset Value we conclude that there is a significant inducement for Du Pont to consummate the merger and a fair realization of benefits in light of the consideration actually given.

We have also confirmed the validity of our recommendations of a Net Asset Value approach for Christiana through a survey of the general acquisition market. In our opinion, premiums of 33-40% over market value are fair offers for the acquisition of control of major industrial concerns. Since this transaction represents an opportunity for Du Pont to acquire, and thus eliminate, the potential control of itself, we believe a higher premium might have been justified. Thus, had we found Christiana's market value a valid basis for beginning our analysis, we would have concluded that a value near or in excess of Net Asset Value would be required to effect a fair offer.

Study of Precedents

Our second approach to the exchange ratio was a careful examination of similar cases to discern whether precedental situations might indicate general business or legal practices in such situations and provide insight into the expectations of Christiana stockholders.

General Investment Company Mergers—Our cases were drawn from several sources including: merger exemptions granted under Section 17 of the 1940 Investment Company Act as suggested by counsel and otherwise; mergers of active holding companies granted an earlier exemption under Section 3(b)(2) of the 1940 Act; and mergers and exchanges directly involving the Christiana Securities Company. Our judgment as to the value of such cases was predicated upon the similarity of the case to the situation at hand. We relied upon the existence of characteristics including the following:

(i) Closed-end investment company merging into a surviving operating company,

(ii) Investment company, a significant minority shareholder of the operating company,

(iii) Operating Company securities comprising all or most of the assets of the investment company,

(iv) Securities of the investment company publicly traded at a discount from underlying net asset value,

(v) Operating company securities traded actively and widely held, and

(vi) Mutual directorships and/or substantial mutual stockholdings.

Our examination included research into the original applications for exemption, SEC notices, orders, and opinions where available, analysis of proxy statements, and in some cases discussions with principals and advisors directly involved. We have also examined SEC documents and proxy material for cases which we do not consider directly relevant.

In our opinion, this review fully supports our recommendations. The following discussion will highlight the major supporting precedents and attempt to distinguish the few questionable cases which we found. In our opinion, all of the cases reviewed by us and found to be a relevant precedent in terms of our criteria provide for an exchange parallel to our recommendations, while none of those cases which comes to a different conclusion is sufficiently similar to the merger under analysis.

Four cases provide close supporting data for our conclusion. In *Huyler's* (1969), the closed-end non-diversified investment company (Huyler's) merged into an operating company, Altamil. Huyler's owned 11% of Altamil's stock which comprised 99% of Huyler's assets. Huyler's had a limited OTC market, and its stock traded at a discount from its underlying Net Asset Value. Altamil was widely traded on the American Exchange. The exchange ratio was based on Net Asset Value despite the Huyler's trading discount. Huyler's did contribute the costs of the merger and some trivial assets ($3,500 value) in the final merger agreement. As to these, we were informed by the principals that they were of the opinion that there were no advantages to Altamil in the merger, and that the majority of the contributed assets were old office furniture and equipment in use by Altamil for some time.

Eastern States Corporation (1969), a registered closed-end investment company, owned 7% of the voting securities of St. Regis Paper Company. These holdings constituted substantially all of its assets. One director and shareholder of St. Regis owned 29.08% of the voting securities of Eastern. In a sale of its assets to St. Regis, the exchange ratio was based upon the Net Asset Value of Eastern's underlying shares. St. Regis shares were exchanged on a share-for-share basis for the St. Regis shares held by Eastern (less net liabilities assumed by St. Regis).

U. S. Foil (1960) was an investment company which had received a 1940 Act exemption under Section 3(b)(2). Foil owned 50.9% of the voting securities of Reynolds Metals, constituting 97.6% of Foil's total assets. Foil's securities traded at a substantial discount from its Net Asset Value. The exchange ratio was intended to provide for a Net Asset Value exchange but actually resulted in a slight premium over the underlying Net Asset Value and a substantial premium over the market price of Foil's stock.

Northeast Capital Corp. (1959) had also received a previous exemption from the 1940 Act under Section 3

(b)(2). Northeast owned 29% of the securities of Mack Truck, and these plus a holding in Mack debentures constituted more than 80% of Northeast's assets. Northeast's stock traded at a discount from its underlying Net Asset Value. The exchange ratio was intended to provide for a net asset value exchange but actually resulted in a small premium over Net Asset Value and a premium over the market price of Northeast's stock. As part of the merger agreement, Northeast agreed to convert its other assets to cash prior to the merger.

In our opinion these four cases present the most factually comparable circumstances to the proposed C. D. merger. In each case, an investment company originally registered under the Investment Act of 1940 or requiring registration but for its active participation, merged or sold its assets to a surviving operating company. In each case, a significant percentage of the operating company's securities comprised 80%-99% of the assets of the merged investment company. Two of the cases (Huyler's and Eastern States) involved presently registered investment companies where the exchange ratio provided for a Net Asset Value exchange recognizing the underlying market values of the operating company's securities owned. The other two cases (U. S. Foil and Northeast Capital) presented two actively controlling exempted investment companies where the exchange ratio was intended to provide for a Net Asset Value exchange but actually resulted in a slight premium over the underlying Net Asset Value. In each of the cases, the market value of the investment company securities sold at a slight to substantial discount from underlying Net Asset Value. We conclude that these four precedents support our recommendation.

There are two other cases, *Detroit and Cleveland Navigation* and *Harbor Plywood*, which are factually similar in all respects except that the operating companies held 12.8% and 73%, respectively, of the investment companies. In both cases, the shareholders of the investment company were given a premium over the Net Asset Value of their shares in the exchange offers. Since the investment companies' shares traded at a discount from the underlying Net Asset Values, the offers represented a significant premium over market value.

In our entire review, we found very few cases, much less comparable to the present situation, which clearly involved exchange ratios below underlying Net Asset Value. These cases may generally be distinguished from the present situation on the basis of one or more of the following criteria: (i) nature of the companies merged, (ii) reasons for merger, (iii) intentions of merger agreement, (iv) nature of resulting company, (v) relative advantages, disadvantages to each of companies involved, and/or, (vi) relative initial bargaining positions.

One of these is Delaware Realty and Investment Company wherein two closed-end investment companies (Delaware and Christiana) merged. Prior to the merger, Delaware owned 32.7% of Christiana. A discount of approximately 1.5% was applied to the adjusted underlying Net Asset Value of Delaware stock to determine the exchange ratio; however, the actual reduction in Net Asset Value amounted to only 0.9% because Delaware was a substantial common stockholder of Christiana and therefore the Delaware stockholders received their pro rata share of enhancement in the Net Asset Value of Christiana stock resulting from the 1.5% discount. The reasoning behind the discount was to provide an inducement to the Christiana shareholders, who enjoyed no other major advantage from the merger.

The Delaware Realty merger can be clearly distinguished from the present circumstances. The major

factual differences are: (i) that Delaware holders received a publicly traded security in exchange for their private holdings, an advantage which we consider to be of significantly greater consequence than the liquidity improvement in the proposed merger, (ii) that the earlier merger represents a combination of two investment companies who continued to operate as an investment company after the merger, indicating that a "going-concern" valuation technique was appropriate rather than the dissolution oriented approach we believe is appropriate for Christiana in the present situation, (iii) that all 1940 Act requirements continued to exist after the earlier merger, in contrast to the considerable simplification which is effected when Du Pont ceases to be a 1940 Act "affiliate company" through the dissolution of Christiana, (iv) that the Wilmington Trust Company held 23.6% of Christiana's common stock and 11.2% of its Preferred which was similar to the Delaware holdings of 32.7% and 29%, respectively, of such securities; thus constituting a second potentially controlling block of stock which has no analog in the present situation, (v) that there was a substantial identity of interest in the holders of the securities of both companies, further minimizing the economic effect of the discount on the Delaware shareholders; which is not the case with the substantial bodies of public stockholders involved here, and (vi) that Delaware was a private company, and thus did not answer to public stockholders as is the case with Christiana.

We believe that each of these factual differences worked to minimize the advantages to the Christiana stockholder in the earlier merger. In our case, however, we believe that each of these points underscores the advantageous position of the Du Pont stockholder, on balance. These, together with the other advantages we have

cited constitute inducement to the Du Pont stockholder. For the foregoing reasons, we could not justify a substantial deviation from our Net Asset Value recommendation on the grounds of the Delaware precedent.

The other cases which suggest an exchange at other than Net Asset Value are even more dissimilar to the proposed merger than the *Delaware* case. They all involve very small companies with Net Asset Values ranging from $5 to $30 million. Thin or non-existent markets for their stock and assets are present in some cases, and others involve private companies. There are also unique circumstances present in many cases which force the use of an unusual exchange ratio or valuation technique. Examples of these are an SBIC with assets of indeterminate value, an "operating company" whose assets are largely investments, the presence of uncertain foreign obligations, and going-concern mergers between two investment companies.

In summary, such other cases are all distinguishable from the general trend of the precedents. The first four cases, *Huyler's, Eastern States, U. S. Foil, Northeast Capital,* are both factually closer to the Christiana and Du Pont merger and also are closer to the general trend of investment company-operating company mergers exchanging at net underlying asset values, as revealed in SEC opinions, counsel reviews, and proxy statements.

Other Christiana Precedents—In addition to the Christiana/Delaware merger, which we do not believe provides guidance for the reasons cited above, there are two other exchanges by Christiana which deserve consideration. These are the exchange offers to Christiana shareholders whereby they could acquire shares of General Motors in one case and Hercules Powder in the other in return for their Christiana shares. In both cases, the stated intention

was to allow the Christiana shareholders to realize full Net Asset Value in the exchange. Based upon the price data provided in the proxy statements, they actually provided for minor premiums. While there is a difference in motivation from the present case, we believe that these may indicate a commitment on the part of the Christiana directors to value the stock at Net Asset Value.

Conclusions from Precedents

In our opinion there is a substantial body of precedents which supports a Net Asset Value exchange and virtually no comparable situation which yields a discount. We conclude from this review that significant justification should be present to depart substantially from the Net Asset Value precedents. On balance, we believe that this body of precedents supports our recommendations.

Pragmatic Considerations

As a third approach, we have explored the pragmatic aspects of the proposed merger and believe that they may bear on the selection of the exchange formula. There are present here a series of interlocking directorships and stockholder positions which are well-publicized. The most recent example is a report by a "public-interest" group which was broadly reported by the general media including such diverse publications as *Business Week* and *Women's Wear Daily*. Given the difficulty of accomplishing the transaction at arms-length in any case, we must question whether any arrangement which does not appear to give the Christiana shareholder his underlying values does not run the substantial risk of being criticized as unfair. Since we believe that the ratio which best meets this requirement is to offer the Christiana shareholder the underlying Net Asset Value of his holdings, we have recommended that negotiations begin at this point.

We also note that from time to time certain legislation has been introduced which would prevent Christiana from accomplishing a tax-free reorganization and therefore prevent its shareholders from realizing the substantial benefits of such a transaction as we have outlined them herein. We have been advised that such a bill has been introduced into the current session of Congress. While there are questions as to that bill's applicability and chances for passage, its introduction underscores the risk of losing the alternative of the tax-free reorganization. We believe that there is an advantage to the Christiana stockholder to accomplishing a merger in the near future in view of the presence of this risk.

Recommended Exchange Formula

The foregoing arguments form the major body of support for our recommendations as to an exchange formula for the proposed merger and the range over which we would consider such ratios fair.

II. Valuation of Christiana Assets

The following paragraphs detail our recommendations for the treatment of those Christiana assets where a valuation issue might exist in assessing their contribution to Net Asset Value.

Du Pont Common and Preferred Stock—Any Christiana capital gains tax liability or benefit is extinguished upon consummation of the proposed merger for these securities. Furthermore, since this is not a class-wide involuntary action, and other shares are readily available in the market, we do not find any support for an argument that the Du Pont Preferred might deserve a liquidation or redemption value. Therefore we recommend valuation of these assets at their market values.

News-Journal Company—We have received and relied upon an experts' appraisal of this property. He estimates the value of the entire property in a non-distress sale to be $24,250,000. There is a substantial body of precedent which minimizes the capital gains aspect of such an acquisition, including the *Pittsburgh Coke* and the *Delaware Realty* case where the liability was split. These generally indicate that capital gains liabilities should not be considered unless there is a compelling reason for the disposal of the asset, such as an anti-trust action. We recognize that this may be present in the proposed merger and therefore are of the opinion that the capital gains tax deserves consideration. We also recognize the possibility of exchanging this particular asset for a more acceptable one in a tax-free reorganization. On balance, we are of the opinion that an investment company stockholder has a fair claim to the market value of his ratable share of investments on a going-concern basis. We believe however, that the appraisal reflects an acquisition premium over the going-concern value and that the fairest treatment of this asset is to recognize both the premium and capital gains liability in Christiana's valuation.

Wilmington Trust Stock—The Christiana holdings of 69,216 shares of the Wilmington Trust Company contain a capital gains liability using the market value as of April 28, 1972. In our opinion, this capital gains liabilities should not act to reduce the value of the Christiana stock in the exchange. First, we cannot identify a compelling reason for the disposal of this small, non-controlling holding as is the case for the newspaper. We further note that Du Pont had a securities portfolio of $14.1 million on December 31, 1971 and that such a portfolio has existed at year end at least since 1967. Thus holding securities would not constitute an unusual activity for the company.

Therefore any liquidation and incurrence of the capital gains tax would be done at the pleasure of the Du Pont company and we believe that the expenses should be borne by its stockholders.

Tax Claim—We have been instructed to ignore the Christiana Federal tax claim on the assumption that it will eventually be distributed to Christiana stockholders. Therefore we have not considered this asset in forming our recommendations and make no representations as to this aspect of the transaction.

Merger Expenses—We believe that there is adequate inducement to both parties to consummate the merger. We are also inclined to discount the question of initiation in view of the substantial interlocking of directorships. Therefore, we recommend that both parties bear their own expenses and equally share in any joint expenses.

Summary of Asset Valuation

Exhibit 1 presents a calculation of Christiana net assets as they would have been valued on April 28, 1972 in accordance with our recommendations.

Christiana Preferred Stock

Christiana presently has outstanding 106,500 shares of 7% Cumulative Preferred stock, par value $100, liquidating value $100, and redemption price $120, held by 1,543 stockholders of record as of December 31, 1971. This stock was originally issued as a stock dividend to the holders of Christiana common in 1922. Of the original 150,000 share issue, 43,500 shares were held by Delaware Realty and Investment Company, which was merged into Christiana in 1961, whereupon the shares were cancelled. Today, there is a thin over-the-counter market for the stock, and on April 27, 1972, there was a single market maker quoting the issue

at 97 bid, 102 asked. We have been informed that another firm's 1964 study indicates that 85% of the Preferred shareholders have a basis in excess of $120 for this stock.

While there are a variety of methods for treating the Preferred stock, we have been advised that the merger participants prefer an exchange of the 7% Preferred for Du Pont common stock and have confined our opinion to that transaction.

We believe that the two relevant values for the Preferred stock are the liquidating value of $100 and the redemption value of $120 (plus accumulated dividends), since the market value approximates the liquidation value at this time. The 7% Preferred votes pari-passu with the common rather than voting on the proposed merger as a class, and therefore cannot block its accomplishment. Thus there is no support for an argument that the Preferred holders deserve a premium over the aforementioned "intrinsic" values of the security because they can prevent the accomplishment of the merger. On the other hand, we are advised by counsel that the security holders do have dissenters' rights in the merger and that it is unlikely that they would receive less than the liquidating value in a judgment. Thus we conclude that a fair value for the Christiana 7% Preferred Stock in an exchange for Du Pont Common stock lies in a range of $100 to $120 plus any accumulated dividends.

There are several factors which indicate an exchange with the 7% Preferred valued at the lower value. First, the exchange for common stock provides the Preferred holder with a significantly more liquid, listed security. In addition, the Preferred holder is not forced into a taxable transaction upon the merger, but rather may hold the Du Pont common and postpone taxation indefinitely, or sell and be taxed as he may choose. In addition, we are advised by counsel, that there is a substantial risk that, on an

individual basis, some 7% Preferred stockholders, could have a cash payment in redemption treated as ordinary income. Furthermore counsel advise that they are doubtful that an opinion could be secured to give favorable assurances on such treatment. Since Du Pont common stock received by Christiana 7% Preferred shareholders would not constitute "Section 306 stock", subsequent disposition of the Du Pont common stock would result in capital gain or loss to the former holders of the Christiana Preferred, thus favorably resolving the risk of dividend treatment which is present in the case of a cash redemption. In addition to the foregoing, we note that Du Pont Common stock and the 7% Christiana Preferred are essentially identical investment media, should Du Pont cease paying dividends or Du Pont or Christiana liquidate, since the Christiana Preferred would have first call on assets which are essentially Du Pont common stock. The Du Pont common is actually in a somewhat senior position to the Christiana Preferred in that the Christiana Board could suspend Preferred dividend payments although the Du Pont common continued to receive them.

There are other factors which indicate that the Preferred should be valued at the redemption price. Absent this potential merger with Du Pont, the only avenue available to the Christiana common shareholders for dissolution of the Preferred class at $100 per share is liquidation of the company. However, as we have indicated in another section of this report, liquidation would cause the common stockholders to incur an ordinary income tax on the distribution to the extent of Christiana's "accumulated earnings and profit". Since the net present value of incurring this tax is much higher than the $2,130,000 cost of paying the redemption premium to Christiana common stockholders who do not wish to liquidate their holdings, Chris-

tiana clearly would have offered the redemption premium rather than liquidating the company.

The other major factor which indicates that a higher value should be offered is the difference between Du Pont common and the Preferred as long as Du Pont continues to pay dividends. In that event as is shown in Exhibit 5, the Christiana Preferred holder faces a reduction of his 7% current yield to 2.96% in the case of a $100 exchange or 3.57% in the case of a $120 exchange. In addition, provided that Du Pont does not cease to pay dividends, one share of 7% Preferred occupies a more secure position than one share of Du Pont common, since it has first claim of any dividends paid to approximately 130 Du Pont shares. This relationship is such that Du Pont could reduce its dividend to slightly more than 1% of its present level before impacting the Christiana 7% Preferred dividend. The other factor which indicates an exchange at higher value is the "nuisance value" of paying a premium to mitigate interference with the merger from dissenting Preferred shareholder actions. Furthermore, we note that there is a precedent available which supports the redemption price valuation. This exists in the form of the Christiana/Delaware Realty Merger where the 7% Preferred was valued at $120 in calculating the net assets of Delaware and Christiana.

On balance, it is our opinion that the average current holder of Christiana 7% Preferred stock is an income-oriented investor whose objective will not be satisfied by the Du Pont yield at either exchange value. This indicates that many of the former Christiana Preferred stockholders will liquidate the Du Pont stock received in an exchange, and will thus not avail themselves of the advantages of the exchange offer which are largely inherent in holding the Du Pont common security. In any case,

the exchange does represent a change in investment character, both in its yield and prior position. Therefore this exchange has the characteristics of a redemption for cash and we believe that the redemption value should be offered as fair consideration for the Christiana 7% Preferred stock. We believe that there are strong reasons for valuing the common stock of Du Pont at the time of the merger for purposes of the common stock exchange and find no reason for an alternative treatment of the Preferred.

Very truly yours,

KIDDER, PEABODY & CO. INCORPORATED

Exhibit 2

Our report is based, among other things, upon the following assumptions:

(i) that the merger which is being contemplated will be a tax-free reorganization of the "A" type.

(ii) that the holders of Christiana 7% Preferred stock will have rights to appraisal of their stock following the merger, and holders of Christiana common stock will not have such rights,

(iii) that the Wilmington Trust Company stock now held by Christiana Securities Company will be transferred to Du Pont and not sold immediately upon its receipt,

(iv) that there are no restrictions on the sale of the Wilmington Trust Company stock,

(v) that the common stock of the News-Journal Newspaper Company, now wholly-owned by Christiana, will be transferred to Du Pont and sold on an orderly basis,

(vi) that a Federal tax claim relating to an earlier divestiture of General Motors stock by Christiana will not be included as part of the transaction, and any expenses in the prosecution of this claim will be accrued and deducted from funds recovered,

(vii) that the parties have agreed to accept a valuation from an independent newspaper appraiser as to the value of the News-Journal Newspaper Company,

(viii) that there are no accounting issues raised in the proposed merger,

(ix) that a Section 333 "one-month" liquidation is not available to Christiana because of the inability to estimate the Federal tax liability,

(x) that a "GM Share" type plan is no longer available to Christiana,

(xi) that there will not be a registration and subsequent sale of Du Pont stock received in the merger by major Christiana Shareholders,

(xii) that Christiana's merger expenses plus one-half of any shared expenses will amount to $605,000,

(xiii) that Du Pont and Christiana financial statements as of December 31, 1971 and Christiana's net cash position as of May 1, 1972 are representative of current values, and

(xiv) that the proposed acquisition of Berg Electronics, announced by Du Pont on June 20, 1972, which has not been included in our consideration, would not have a material effect on our conclusions.

Exhibit 4

Advantages and Disadvantages

(Assuming Net Asset Value Exchange)

CHRISTIANA

Advantages

1. Realization of underlying asset value (32% premium over market)
2. Elimination of Federal tax on Du Pont dividends
3. Elimination of Christiana operating expenses
4. Realize a more liquid listed holding
5. 59% increase in EPS (largely from accounting treatment)
6. 10% increase in dividends
7. Elimination of potential conflict of interest situation
8. Participate directly in Du Pont management

Disadvantages

1. Loss of 28% "control" block of Du Pont stock
2. 59% dilution of net asset value
3. Minor loss of diversification from newspaper and trust company
4. Increased estate taxes
5. Expenses of merger

DU PONT

Advantages

1. Controlled elimination of 28% "control" block of stock (potential market pressure and/or tender offers)
2. Elimination of affiliate status under the 1940 Act
3. 28% increase in shares available to public for trading
4. Potential increase in earnings on incremental shares
5. Accomplishment of an action apparently in the public interest
6. Elimination of potential conflict of interest situation

Disadvantages

1. Minor decrease in book value
2. Expenses of merger

CHRISTIANA EXHIBIT NO. 3

[Letterhead of]

KIDDER, PEABODY & CO.
INCORPORATED

10 HANOVER SQUARE
NEW YORK, N. Y. 10005

July 17, 1972

The Board of Directors
Christiana Securities Company
3046 Du Pont Building
Wilmington, Delaware 19898

Gentlemen:

You have requested our opinion regarding a proposed merger of Christiana Securities Company ("Christiana") and E. I. du Pont de Nemours & Co., Inc. ("Du Pont"). In assisting you in your evaluation of this transaction we have discussed our views with your representatives on several occasions, participated in a meeting on June 30, 1972 attended by the Special Committee of the Board of Directors of the Du Pont Company and the Special Committee of the Board of Directors of Christiana Securities Company and the other Advisors, and prepared a report dated July 7, 1972 for the Christiana Special Committee in which we recommended an appropriate range of exchange ratios between the common shareholders of both companies and an offer which we considered fair to the holders of Christiana's 7% Preferred Stock.

We understand that on July 17, 1972 you approved a merger of Christiana into Du Pont on the basis of exchanging 1.123 common shares of Du Pont for each

Christiana common share and exchanging $120 in Du Pont common shares valued at the average closing price on the ten trading days preceding the effective date of the merger, plus any accrued dividends paid in cash, for each Christiana 7% Preferred share. We further understand that when the Christiana Federal tax claim has been settled, a second distribution of the proceeds therefrom, less related expenses, will be made to the former Christiana common shareholders.

In connection with this transaction we have considered relevant financial factors such as earnings, dividends and book values; net asset values and market values; advantages and disadvantages to all parties; certain alternative courses of action available to Christiana; certain similar transactions which might be considered as precedents; certain other non-financial factors; and other factors we deem to be relevant.

In connection with our determination of Christiana's net asset value, we have examined and evaluated certain assets and liabilities of Christiana, including its holdings of 13,417,120 shares of Du Pont common stock, 16,256 shares of Du Pont $4.50 Preferred Stock, 69,216 shares of Wilmington Trust Company common stock, all of the outstanding common stock of The News-Journal Company, cash and equivalent assets, current liabilities, potential capital gains tax liabilities, the Federal tax refund claim of Christiana and related expenses, and certain expenses of the merger.

On certain matters we have relied on the advice of counsel and, in the case of The News-Journal Company, we have relied on the opinion of an independent expert.

After consideration of these factors and based upon the terms referred to above, it is our opinion that the foregoing ratios fall within the range recommended by

us and are fair and reasonable to Christiana and its common and preferred shareholders as of the date of this letter.

Very truly yours,

KIDDER, PEABODY & CO. INCORPORATED

CHRISTIANA EXHIBIT NO. 4

CHRISTIANA SECURITIES COMPANY

Federal Income Tax Basis to Present Holders of Christiana Securities Company Common Stock

I. Basis of shares held by individuals, fiduciaries, corporations subject to federal income tax.

Basis [1]	*Source*		*Totals*	
	Wilmington Trust Company [2]	*T. E. House Survey* [3]		
$0	1,402,594	1,537,395	2,939,989	
.01-25.00	2,915,058	194,694	3,109,752	
25.01-50.00	673,646	72,052	745,698	
50.01-100.00	673,769	177,133	850,902	
100.01-150.00	195,526	38,314	233,840	
over 150.00	322,215	28,510	350,275	
Totals	6,182,808	2,048,098	8,230,906	Total number of Shares accounted for on Basis Studies

II. Total number of shares held by or for tax-exempt organizations (See note 1) 1,288,986

III. Total number of shares for which no information available 2,190,211

Notes:

1. Basis figures do not include basis of 622,540 shares held by Wilmington Trust Company for tax-exempt organizations, such as public charities and private foundations. Basis figures also do not include basis of an additional 666,446 shares registered in the name of such organizations.
2. Based on analysis by Wilmington Trust Company of shares held by Wilmington Trust Company as fiduciary or custodian on January 8, 1973. An additional 39,887 shares are held by Wilmington Trust Company for which Wilmington Trust Company has no basis records and an additional 19,688 shares are held in acounts for which Wilmington Trust Company has no responsibility for maintaining basis records.
3. Survey by T. E. House, Treasurer of Christiana Securities Company, based on numbers of shares held on May 22, 1972 by persons surveyed, except that numbers of shares registered in the name of Henry B. du Pont or his Estate have been adjusted for distributions from the Estate to accounts in Wilmington Trust Company and to certain charitable organizations between May 22, 1972 and January 8, 1973.

DIVISION EXHIBIT NO. 1

E. I. DU PONT DE NEMOURS AND COMPANY
CHRISTIANA SECURITIES COMPANY

June 6, 1972

Morgan Stanley & Co.
140 Broadway
New York, New York 10005

Gentlemen:

The Boards of Directors of E. I. du Pont de Nemours and Company and Christiana Securities Company have each designated a Committee to negotiate a proposed merger of Christiana into Du Pont. We request that Morgan Stanley & Co. advise the Committees of each Board with regard to the proposed transaction.

You are requested to render an opinion and accompanying report addressed to both Committees, based upon a financial analysis and evaluation and taking into consideration all material factors you believe to be relevant to assist the Committees in their negotiations. Your report should set forth a range of ratios of exchange of Christiana Common Stock for Du Pont Common Stock and recommendations as to terms of exchange of Christiana Preferred Stock which you consider fair and reasonable to both Du Pont and Christiana and the shareholders of each such company. The merger will be subject to the approval of the Securities and Exchange Commission under the provisions of Section 17 of the Investment Company Act of 1940, which provides that as a prerequisite to approval, the Commission must determine, among other things, that the terms of the proposed transaction are reasonable and fair and do not involve overreaching on the part of any person concerned.

We understand that you will undertake the study necessary to prepare such report and formulate such opinion immediately with a view to furnishing such material by June 20, 1972 if practicable. If you are willing to accept this assignment, please sign the two copies hereof and return one of the same to each of the companies.

Very truly yours,

SPECIAL COMMITTEES OF THE BOARD OF DIRECTORS OF:

E. I. DU PONT DE NEMOURS AND COMPANY
/s/ C. B. McCOY
C. B. McCoy
/s/ I. S. SHAPIRO
I. S. Shapiro

CHRISTIANA SECURITIES COMPANY
/s/ EDWARD B. DU PONT
Edward B. du Pont
/s/ A. FELIX DU PONT, JR.
A. Felix du Pont, Jr.

The foregoing assignment
is hereby accepted.

MORGAN STANLEY & CO.
/s/ MORGAN STANLEY & CO.

APPENDIX A

ATTACHMENT 2

June 6, 1972

FACTORS TO BE CONSIDERED IN REPORT OF INVESTMENT BANKERS

The purpose of this memorandum is to set forth the factors which should be considered in the report of investment bankers requested by a special Committee of the Board of Directors of E. I. du Pont de Nemours and Company designated to negotiate a merger with Christiana Securities Company. This memorandum is based upon a review of the pertinent Securities and Exchange Commission decisions under Section 17(a) of the Investment Company Act of 1940. In general, the Commission examines proposed transactions in the light of all relevant financial considerations. In passing on merger terms affecting common stock, the Commission has looked to such factors as comparative earnings, dividends, market values and net asset values (including adjustments for potential taxes arising from unrealized capital gains in portfolio securities and the tax benefits resulting from tax loss carryforwards). No single factor has been considered determinative. In dealing with merger terms for preferred stock, the Commission has taken into account dividend and redemption terms, asset values, asset value coverage and dividend coverage.

The investment bankers' report to the du Pont negotiating committee should consider the pertinent financial factors and discuss the reasons why particular factors should, or should not, be given any particular weight in the negotiations.

There follows a brief summary of pertinent factors affecting the merger terms for Christiana Common Stock.

The terms of treatment of the Christiana Preferred Stock appear to present no unique problems from the financial point of view.

Earnings and Dividends. Since substantially all of Christiana's income consists of dividends on du Pont stock, comparative earnings would not appear to be an important factor. Christiana has followed the policy of distributing to its shareholders substantially all of its income after Federal income taxes. The principal factor affecting Christiana earnings is the corporate income tax at an effective rate of approximately 7.2 percent. Consideration should be given to the value to Christiana shareholders of the elimination of this tax.

Market Values. Christiana's Common Stock has sold at a substantial discount from the net asset value (on a market price basis) of the underlying du Pont Common Stock. This discount has in recent years been in excess of 20 percent. Subsequent to the announcement of the proposal to study a merger, the discount has narrowed somewhat. The investment bankers' report should consider all pertinent factors explaining the existence of this market discount.

From du Pont's point of view, the most favorable terms of a merger would be those that approach the full amount of the discount. However, in the *Delaware Realty* case, the SEC accepted, as a basis for merger terms, values based on underlying net asset values. The rationale for this was that the parties to the merger had alternative means of recognizing net asset value without significant tax effect.[1] We understand that Christiana would be prepared to take the same position here: Under the 30-day liquidation provisions of Section 333 of the Internal Revenue

1. Other similar cases considered by the SEC have involved little or no discount, but have not expressed a specific rationale for this approach.

Code, Christiana presumably could achieve with relatively limited taxation a liquidation in which its du Pont securities would be distributed directly to its shareholders. Counsel to Christiana is preparing a memorandum describing the application of Section 333 to a dissolution of Christiana.

The report should indicate whether, on the assumption that the 30-day liquidation provisions would operate to Christiana's benefit here, du Pont would be justified in giving little weight to the market value of Christiana in the merger negotiations.

The Delaware Supreme Court has held that under the Delaware appraisal law the shareholders of a closed-end investment company whose stock has sold at a discount from net asset value are entitled only to the net asset value less the market discount. The investment bankers' report should indicate whether this factor should be given any weight in the merger negotiations.

The distribution of du Pont stock to the shareholders of Christiana may provide an incentive for such shareholders to dispose of their holdings. While affiliates of Christiana may be restricted in the amount and method of disposition of du Pont stock, a substantial portion of such stock will be freely marketable. Christiana is also considering whether its affiliates may seek registration rights for an underwritten public offering following the merger. The possibility that these factors may have a depressant effect on the market price of du Pont Common Stock should be considered.

Net Asset Value. The SEC has held asset values relevant in valuing investment companies, but has not given any appreciable weight in valuing industrial concerns.

The investment bankers' report should indicate whether from du Pont's point of view any arguments can

be made that Christiana's du Pont stock holdings should be valued at less than market and should also indicate the grounds for rejecting any possible assertion by Christiana that the stock should be valued at more than market.

While a discount for potential tax on unrealized capital gains is often appropriate, that factor does not appear relevant to the du Pont stock held by Christiana inasmuch as the stock would, under the present approach, be immediately cancelled.

Christiana has suggested that it may assert that its holdings of du Pont stock are entitled to a premium in the merger on the basis that they constitute a controlling block. The investment bankers report should consider from the financial point of view whether this claim has any merit. For example, the likelihood that any third party would be willing, as well as legally and financially able, to purchase control of du Pont should be considered. If the investment bankers consider it desirable, we would be prepared to advise on the antitrust aspects of such a disposition, as well as on the likelihood of the SEC accepting any merger terms based on a control block premium.

Christiana holds approximately 3 percent of the outstanding common stock of Wilmington Trust Company. On the assumption that this is transferred in the merger and that du Pont is anxious to dispose of it as promptly as possible, pertinent factors such as blockage and effect of unrealized capital gains should be considered.

Christiana also holds all the outstanding stock of the Wilmington News-Journal. The valuation of this asset will be undertaken by a single financial expert, whose report would be made available to du Pont's bankers. Du Pont intends to dispose of the newspaper as promptly as practicable. The report should consider the feasibility of using a certificate of contingent interest in the merger, with Christiana shareholders to receive du Pont shares

(valued on the basis used in the merger) equivalent to the net after-tax proceeds of sale by du Pont.

Christiana has a tax claim against the Government for a refund of approximately $21 million plus interest. Dewey, Ballantine, counsel to Christiana in the litigation, has been asked to prepare a memorandum setting forth their views on the ultimate amount recoverable. In addition, Christiana may seek to enter into settlement negotiations with the Government prior to the merger. Consideration should be given to handling the tax claim by a certificate of contingent interest.

Covington & Burling

APPENDIX A

ATTACHMENT 3

EFFECT OF COMPLIANCE WITH INVESTMENT COMPANY ACT OF 1940 ON DU PONT

Attached is a summary of 1940 Act applications filed by Du Pont since 1967 which illustrates the administrative efforts required by Du Pont to comply with the requirements of the Act. Although not entirely apparent from this summary, there have been several instances where the need to obtain a 1940 Act exemption has resulted in certain internal difficulties. For example, on 5 occasions in the past 5 years Du Pont has requested exemptions for transactions involving grants of exclusive licenses, and although no business delays resulted, problems were encountered in structuring the transactions so as to comply with the requirements of the Act, pending the receipt of an exemption order.

Sufficient detail is not available to determine the time spent by Du Pont employees on specific 1940 Act exemption requests. However, based on total time spent on 1940 Act matters over the past 5 years, it is estimated that, on average, such work required the equivalent of 1½-2 employees on a full-time basis.

Treasury Division

6/13/72

1940 ACT APPLICATIONS FILED BY DU PONT WITH THE SECURITIES AND EXCHANGE COMMISSION 1967-1972

Description of Transaction for which Exemption Requested	*Date Application and Amendments Filed*	*Date of Order*	*Comments*
1. Du Pont purchase of real property from Wilmington Trust Company. The subject property was located adjacent to Du Pont's home office buildings in Wilmington, Delaware; Du Pont's interest in acquiring subject property was to protect its substantial investment in its home office buildings. Wilmington Trust Company was deemed to be an affiliate of Christiana, and in turn Du Pont, by virtue of its 45% holdings in Christiana common stock (as trustee or nominee).	12-19-66 3-21-67	5-19-67	None
2. Loans to Du Pont employees. Exemption was obtained in 1953 whereby Du Pont could loan funds to its employees for acquiring residential property or for emergency purposes, under certain dollar limitations. The purpose of this subsequent request was to raise the dollar limitations, which Du Pont believed had become unduly restrictive under 1968 conditions.	12-19-68 4-22-69	4-10-70	The delay (16 months) in obtaining this exemption order caused some internal difficulties—e.g., some transferred employees probably faced cash shortage problem thus creating dissatisfaction; some employees probably were not transferred (or at least were delayed) because of restrictive limit on the amount of cash they could borrow from Du Pont; some employees may not have accepted transfers because they were unable to finance housing similar to what they had been accustomed.
3. Du Pont assignment of certain patent applications and a patent to one of its employees, Frederic A. Lang. Lang, who was actively involved in the invention of the subject of these patents (which relate to the design and use of tendons and anchoring systems for post-tensioning concrete), wished to devote his full time to the exploitation of these patents; Du Pont was willing to sell the rights since considerable expense and risk would have had to be incurred to develop a related profitable business.	2-11-69 7-25-69	7-31-69	None
4. Du Pont proposed sale of 27,750 shares of common stock of Ocean Science and Engineering, Inc. (OSE) to Willard N. Bascom, President of OSE and accordingly an affiliate of an affiliate of Christiana. In June 1969, Bascom requested that Du Pont permit him to assign his purchase rights on a joint and several basis to Allstate Insurance Co. and Barcus, Kindred	3-21-69	Withdrawn 8-4-69	None

Description of Transaction for which Exemption Requested	*Date Application and Amendments Filed*	*Date of Order*	*Comments*
& Company. Du Pont agreed to sell its OSE interest to these two nonaffiliated companies and accordingly withdrew the 1940 Act exemption request.			
5. Du Pont sale of 55,252 shares of Cryogenic Engineering Company common stock as part of an underwritten public offering by Cryogenic. Cryogenic, as well as a number of its other shareholders, participated in the offering.	7-25-69 11-26-69	12-1-69	Du Pont's participation in this public offering was contingent upon receiving the 1940 Act exemption order prior to the effective date of the offering. The effective date for the Cryogenic offering was delayed primarily because of stock market considerations which also provided time to obtain the exemption order.
6. Du Pont sale of 2,100 shares of Wheaton Plastics Company common stock to Wheaton Glass Company, a company under common control with Wheaton Plastics by Wheaton family interests—thus, an affiliate of an affiliate of Christiana.	10-31-69 3-11-70	4-2-70	None
7. Du Pont purchase of land from an employee, James F. Skeeler. The subject land was located near Du Pont's Sabine River Works Plant, Orange, Texas, and was improved by a golf course which was constructed by a Du Pont association	Notice 7-21-70	N.A.	None

Description of Transaction for which Exemption Requested	*Date Application and Amendments Filed*	*Date of Order*	*Comments*
for use by Du Pont employees. An SEC exemption order had previously been obtained permitting such purchases as long as the SEC was provided advance notice.			
8. Du Pont grant of an exclusive license to Block Engineering, Inc., an affiliate of Du Pont by virtue of Du Pont's 33% interest in Block common stock. This grant of an exclusive license under a U. S. patent application allowed Block to make and sell an improved sensor head for pressure sensing devices.	9-11-70 12-16-70 4-8-71	5-25-71	No business delay was incurred since the license was granted to Block on a nonexclusive basis until such time as the exemption order was received.
9. Du Pont grant of an exclusive license to Digilab, Inc., a wholly-owned subsidiary of Block and thus an affiliate of Du Pont. This grant of an exclusive license under a U. S. patent allowed Digilab to produce and sell optical thickness gauges.	9-11-70 12-16-70 4-8-71	4-16-71	No business delay was incurred since the license was granted to Digilab on a nonexclusive basis until such time as the exemption order was received.
10. Awards of stock options under Du Pont's Bonus Plan "C". Du Pont requested exemption whereby certain Du Pont employees, who were also affiliated persons of Christiana Securities Co., could (1) exercise	10-30-70 2-3-71 2-10-71 6-23-71	1-27-72	After considerable discussions with the SEC, an exemption order was finally granted nearly 15 months after filing of the original application. The final order of exemption was significantly more restrictive than the exemption

Description of Transaction for which Exemption Requested	Date Application and Amendments Filed	Date of Order	Comments
stock options previously awarded under Bonus Plan "C" and (2) receive and exercise stock options granted in the future under Bonus Plan "C".			requested by Du Pont—i.e., subject Du Pont employees were allowed to exercise stock options received prior to 8-10-70, but were not permitted to receive future options under Bonus Plan "C".
11. Du Pont grant of an exclusive license to Showa Neoprene K. K., a 50%-owned Japanese subsidiary of Du Pont. This grant of an exclusive license provided Showa with certain technical information and patents covering a process for converting butadiene to chloroprene.	12-16-70 4-8-71	5-17-71	No business delay was incurred since the license was granted to Showa on a nonexclusive basis until such time as the exemption order was received.
12. Du Pont grant of an exclusive license to Policron de Mexico, S. A., a 49%-owned Mexican subsidiary of Du Pont. This grant of an exclusive license provided Policron with technical information and patent rights related to the manufacture of polyester fiber.	8-23-71	1-7-72	No business delay was incurred since the license was granted to Policron on a nonexclusive basis until such time as the exemption order was received.
13. Du Pont of Canada participation in joint mining ventures with certain affiliated Mexican and Canadian companies. The subject application requested exemption so that	8-24-71 12-14-71	12-29-71	Extensive administrative time and effort were required in preparation of this application—since all those companies involved were either Canadian or Mexican, data were not readily ob-

Description of Transaction for which Exemption Requested	Date Application and Amendments Filed	Date of Order	Comments
DOC, a 75%-owned subsidiary of Du Pont, could participate with affiliates in (1) a specific proposed venture principally in Mexico, and (2) future mining ventures.			tainable thus necessitating trips to both Canada and Mexico. In addition due to the delay in obtaining SEC exemption (i.e., original agreement signed in August 1970), certain companies who were to receive cash as a part of the transaction had to obtain interim cash from other sources. Further, DOC personnel were restricted from active participation in the venture until receipt of exemption. The final exemption order also placed significant restrictions and limitations on future mining ventures among the parties involved. These restrictions could quite possibly hinder future transactions since the mining industry usually requires quick decisions—delay involved in seeking exemption might cause a company to lose an opportunity to participate in an attractive venture.
14. Du Pont grant of an exclusive license to Mitsui Fluorochemicals Co., Ltd., a 50%-owned Japanese subsidiary of Du Pont. The subject license provided Mitsui with technical information and patent rights required	10-25-71 2-18-72	3-17-72	No business delay was incurred since the license was granted to Mitsui on a nonexclusive basis until such time as the exemption order was received.

Date Application and Amendments Filed	*Description of Transaction for which Exemption Requested*	*Date of Order*	*Comments*
	for the manufacture and sale of certain fluorocarbon plastic materials.	N. A.	None.
Notice 5-23-72	15. Du Pont sale of residential property to an employee, Marvin B. Parks, Jr. The subject property was located in Seaford, Delaware, and was improved by a home previously used as a residence of Du Pont plant managers at its Seaford plant. An SEC exemption order had previously been obtained permitting such sales as long as the SEC was provided advance notice.		

Treasury Division
June 13, 1972

DIVISION EXHIBIT NO. 2A

[Letterhead of]

DECHERT PRICE & RHOADS
1600 Three Penn Center
Philadelphia, Pa. 19102
(215) LOcust 8-1600

June 20, 1972

Mr. A. Felix du Pont, Jr.
Mr. Edward B. du Pont
Special Committee of
The Board of Directors
Christiana Securities Company
3046 Du Pont Building
Wilmington, Delaware 19898

Re: *Section 333 Liquidation*

In your capacity as members of the Special Committee of the Board of Directors of Christiana Securities Company to explore the feasibility of a possible merger of Christiana into the Du Pont Company, you have requested our advice as to the feasibility of a liquidation of Christiana under § 333 of the Internal Revenue Code, and specifically as to the tax costs which might be incurred by Christiana and its shareholders in effecting such a liquidation.

Statement of Facts

Christiana's assets presently include 13,417,120 shares of the common stock of Du Pont, 16,256 shares of the $4.50 cumulative preferred stock of Du Pont, constituting, respectively, 28.38% of the outstanding common stock and 0.962% of the outstanding $4.50 cumulative preferred stock; 7,460 shares, or 100% of the outstanding capital stock, of

The News-Journal Company ("News-Journal"); 69,216 shares (approximately 3.45%) of the common stock of Wilmington Trust Company; a suit for refund for federal income tax plus interest for the years 1962, 1964 and 1965, in the total amount of approximately $21 million; and cash and cash equivalents which, as of May 1, 1972, net of current liabilities, were $5,238,875.

We understand that Christiana has not purchased any of the stock of Du Pont, Wilmington Trust Company or the News-Journal which it presently holds since December 31, 1953. Christiana's only increases in its holdings of stock since that date have been as follows:

(1) Christiana acquired 16,256 shares of Du Pont $4.50 cumulative preferred stock and 1,217,920 shares of Du Pont common stock in the merger of Delaware Realty and Investment Company into Christiana in 1961. All of these shares were acquired by Delaware Realty and Investment Company prior to January 1, 1954.

(2) Wilmington Trust Company effected a 20% stock dividend in 1954, a four-for-one stock split in 1959, and a 100% stock dividend in 1966. We understand that the split and the stock dividends in each instance were non-taxable.

The only purchase of stock or securities (other than short-term debt obligations) by Christiana since December 31, 1953 was the purchase of shares of General Motors Corporation common stock pursuant to a 1955 rights offering. None of these shares are now held by Christiana.

The presently outstanding stock of Christiana consists of 106,500 shares of 7% cumulative non-voting preferred stock, which were held by 1,543 shareholders of record as of December 31, 1971, and of 11,710,000 shares of outstanding common stock, par value $1.25 per share, which were held by 6,815 shareholders of record as of December 31, 1971.

Haskins & Sells is in the process of making an earnings and profits study of Christiana. Subject to their confirmation of the initial capital of Delaware Realty and Investment Company and of the amount of the reduction of Christiana's capital caused by the redemption of certain shares of Christiana's common stock, and of the issuance of their final report, we understand that they have concluded that Christiana's earnings and profits, as of December 31, 1971, were approximately $85,800,000.

The federal income tax bases and estimated fair market values as at May 1, 1972 of Christiana's principal assets are as follows:

		Value at May 1, 1972	
No. of Shares	*Company*	*Carrying Value*	*Market Value*
13,417,120	Du Pont, Common	$74,621,915	$2,222,210,500*
16,256	Du Pont, $4.50 Pfd.	1,298,056	1,095,248*
69,216	Wilmington Trust, Common	903,592	2,837,856**
7,460	News-Journal, Common	846,107	***
	Total	$77,669,670	$2,226,143,604

* Based on NYSE closing prices—but this may not be the realizable value of such a large block of stock.

** Based on closing bid price in local OTC market—but this may not be the realizable value of such a large block of stock.

*** There is no market quotation available. The News-Journal Company's accounts at December 31, 1971 show net assets of that company of approximately $6,800,000.

Based upon an offer of settlement of the federal tax refund litigation made by Christiana, the value of the refund claim is $7,130,000 plus interest, less presumably the federal income tax payable with respect to such interest.

A preliminary analysis of the shareholders of Christiana indicates that of the 11,710,000 shares of outstanding common stock, 11,186,525, or 95.53%, are held by holders of 1,000 or more shares each.

It is understood that Christiana has a substantial number of individual and other non-corporate shareholders in Pennsylvania as well as, of course, Delaware.

DISCUSSION

I. *Requisites of Liquidating Corporation.*

Christiana is a domestic corporation and is not a collapsible corporation to which § 341(a) of the Internal Revenue Code applies. Therefore, Christiana is eligible for a § 333 liquidation.

II. *Eligibility of Shareholders.*

The benefits of § 333 are available only to "qualified electing shareholders." In order to become a "qualified electing shareholder," a shareholder must file a written election on Treasury Form 964 with the appropriate Internal Revenue Service official. In order to make the election of any non-corporate shareholder valid similar elections must be filed by the holders of at least 80% of the total number of shares of common stock of Christiana held by non-corporate shareholders. Similarly, in order to make the election of any corporate shareholder valid, the holders of at least 80% of the total number of shares of Christiana common stock held by corporate shareholders must file elections on Form 964.

The Forms 964 must be filed within 30 days after adoption by Christiana of a plan of liquidation. In Christiana's case it would be necessary to devise some procedure whereby the shareholders, at the time they were asked to vote on or to give proxies to vote on the plan of liquidation, would also commit themselves to the filing of Form 964. This would be necessary because most shareholders would not want to vote favorably on the plan of liquidation unless they were assured that the holders of at least 80% of the stock in their group would also vote favorably on the plan.

In our opinion these procedural requirements could be satisfied by having the Christiana shareholders give powers of attorney to an appropriate person, such as Wilmington Trust Company, to execute Forms 964 on their behalf, conditioned upon the adoption of the plan of liquidation by the requisite percentage of the other shareholders of the same class. It may be noted that the Instructions for Form 964 (a copy of which is attached) contemplate that powers of attorney may be utilized. Thus, if the requisite percentage of shareholders of each class approved the liquidation and granted the powers of attorney, the plan of liquidation would become effective and the Agent would file elections on behalf of all qualified electing shareholders within 30 days after adoption of the plan of liquidation.

We have considered the question whether a power of attorney given by a shareholder might lapse if the shareholder died, became incapacitated or became bankrupt prior to the exercise of the power. Since over 95% of the common stock of Christiana is held by a relatively small number of record holders of 1,000 or more shares, it should be feasible, immediately prior to the exercise by the Agent of the authority to file Forms 964, to ascertain that a sufficient percentage of the holders of stock of each class had not died, become incapacitated or bankrupt. Alternatively, a sufficient percentage of the shareholders of each class could be asked to execute Forms 964 directly.

III. *Effecting the Distribution Within One Calendar Month.*

Section 333 requires that all of the assets of the liquidating corporation be distributed to the shareholders in complete liquidation within some one calendar month. However, this need not necessarily be done within the

calendar month in which the plan of liquidation is adopted. Furthermore, Christiana would be permitted to retain cash or other liquid assets reasonably estimated to be necessary to provide for contingent or unascertainable liabilities and for any further expenses of its liquidation and dissolution, and if any amount remained after payment of all such liabilities Christiana could later distribute the remainder without violating the one-month rule. *Rev. Rul. 56-286,* 1956-1 C. B. 1972.

The principal assets of Christiana consist of its stock of the Du Pont Company, of Wilmington Trust Company, and of the News-Journal, and the federal income tax refund suit. Distribution of the first three of these to the shareholders within one calendar month could be effected by the transfer of all such stock to an exchange agent acting for the shareholders pursuant to the plan of liquidation. As long as delivery to the exchange agent were made within a single calendar month, it would not be necessary for the exchange agent to complete the physical exchange of certificates for shares of stock of the Du Pont Company, of Wilmington Trust Company, or of News-Journal for Christiana certificates within the calendar month. The exchange agent could also issue non-transferable order forms, or similar documents, to the Christiana shareholders by which the shareholders could authorize the exchange agent to buy or sell fractional share interests in the stock of Du Pont, Wilmington Trust Company or News-Journal* which undoubtedly would result from the liquidation. Similar procedures were approved by the Internal Revenue Service in *Rev. Rul. 56-286,* ante.

In the event that it was impossible to locate a Christiana shareholder at the time of the liquidation, his share

* If desirable, there could be a preliminary split of the stock of News-Journal to facilitate the liquidation.

of the property distributed could be transferred to a trustee for his benefit. *Rev. Rul. 57-140,* 1957-1 C. B. 118.

Distribution of the tax refund claim could be effected by the distribution of beneficial ownership of the claim within the calendar month of the liquidation to a trustee for the benefit of Christiana's shareholders. The trustee could then proceed to prosecute or settle the cash and distribute the proceeds of the settlement to Christiana's shareholders. A similar procedure was approved in connection with a § 337 or 12-month liquidation by *Rev. Rul. 63-245,* 1963-2 C. B. 144.

IV. *Amount of Gain Recognized to Shareholders.*

The gain *realized* by a shareholder of a corporation undergoing a § 333 liquidation (i.e., the sum of the money received plus the fair market value of property received, minus his basis) is *recognized* (i.e., taxed) only to the extent of the *larger* of the following: (1) his share of the undistributed earnings and profits of Christiana, computed as of the end of the month in which the liquidation takes place, or (2) the sum of the money plus the fair market value of any stock or securities acquired by Christiana after December 31, 1953 received by such shareholder.

Christiana's earnings and profits must first be allocated between the preferred and the common stockholders, for it is only a shareholder's "ratable share" of the earnings and profits which is taken into account in determining the gain recognized to him. Since the preferred stock of Christiana was issued to the common shareholders in 1922 as a non-taxable stock dividend, in our opinion on the liquidation of Christiana all amounts distributable to the preferred shareholders, less the proper proportion of the amounts originally paid in to Christiana's capital, must be considered as a distribution of earnings and profits. We

understand that the basis of the preferred stock of Christiana, immediately after 1922 distribution, was $24 per share to the original Christiana shareholders. On the assumption that the preferred stock was worth $100 per share at the time, and that the original basis of the common stock was $100 per share, this would indicate that $24 of the amount originally paid into Christiana's capital for one share of common stock should be allocated to the preferred stock. Thus, assuming that there are no accumulated unpaid dividends on the Christiana preferred stock at the time of liquidation, its shareholders would receive a distribution of $100 per share, $76 of which would be considered as a distribution of earnings and profits (a total of $8,094,000), and the remaining $24 of which would be a return of capital.

On the assumption that Christiana's earnings and profits as of the end of the month of the liquidation will be $85.8 million, this would mean that a total of $77.71 million of earnings and profits would be allocable ratably among each of the shares of common stock of Christiana. This works out to be approximately $6.63 of earnings and profits per common share.

As of May 1, 1972, Christiana's stock or securities acquired since December 31, 1953 included certain short-term cash equivalents, certain shares of Wilmington Trust Company acquired incident to stock dividends or splits, and 16,256 shares of Du Pont $4.50 preferred stock and 1,217,920 shares of Du Pont common stock, acquired in 1961 incident to the merger into Christiana of Delaware Realty and Investment Company. In addition, as of May 1, 1972 Christiana had cash which, together with cash equivalents, net of liabilities, amounted to $5,238,875.

All of Christiana's cash and short-term cash equivalents not needed to pay expenses could be distributed to

the preferred shareholders of Christiana. These would not result in any additional potential for recognized gain to the preferred shareholders since the major portion of the amount distributable to them is considered to be a distribution of earnings and profits.

Additional shares of Wilmington Trust Company received after December 31, 1953 incident to stock dividends or splits are not considered to be acquired after December 31, 1953 for purposes of § 333, since the additional shares are traceable to stock of Wilmington Trust Company actually owned by Christiana on that date. *Rev. Rul.* 58-92, 1958-1 C. B. 174.

It is unclear whether the Du Pont $4.50 preferred stock and common stock acquired by Christiana in 1961 incident to the Delaware Realty merger must be considered as having been acquired on that date for purposes of § 333. That stock was actually acquired by Delaware Realty prior to January 1, 1954, and we know of no reason why Delaware Realty itself would not have been eligible for a § 333 liquidation. In *Rev. Rul. 64-257*, 1964-2 C. B. 191, it was held that stock acquired in a similar transaction could not be considered as having been acquired on the date that the corporate predecessor acquired it. However, the reasoning of the Ruling was that the predecessor was a foreign corporation, and since a foreign corporation is not eligible to liquidate under § 333, "tacking" of the holding period of the foreign corporation was not permissible. Similar reasoning appears to underlie *Rev. Rul. 58-92*, where it was held that stock acquired by a corporation in 1955 incident to a tax-free transfer to it from an individual under § 351 of the Internal Revenue Code could not be considered as having been acquired prior to January 1, 1954, even though it was actually acquired by the individual prior to that date.

Based upon the reasoning of *Rev. Rul. 64-257* and upon the eligibility of Delaware Realty for a § 333 liquidation, we believe that the proper conclusion is that the Du Pont preferred and common stock received on the merger of Delaware Realty must be considered as having been acquired before January 1, 1954. We must point out, however, that the Internal Revenue Service's position may very well be to the contrary, and in that event the shareholders would have to be advised in connection with the liquidation that the treatment of this Du Pont stock might be contested and that litigation might result. While we believe that the chances of success in any such litigation would be materially better than 50%, nevertheless no firm assurance could be given that the shareholders would prevail.

The total value of the Du Pont $4.50 preferred stock and common stock acquired by Christiana from Delaware Realty, based upon market prices on June 15, 1972, plus Christiana's net cash as of May 1, 1972 of $5,238,875, is $212,652,662. Since the preferred shareholders of Christiana would be treated as having received a distribution out of earnings and profits in the amount of $76 per share, and since we understand that no holder of Christiana preferred has a basis of less than $24 per share, the preferred shareholders could receive Du Pont preferred and common stock acquired from Delaware Realty without adversely affecting their tax treatment of the liquidation. Assuming that Christiana's net cash as of May 1, 1972, plus Du Pont stock acquired from Delaware Realty, is distributed to the preferred shareholders, the total value of the Du Pont preferred and common stock received from Delaware Realty remaining for distribution to the common shareholders of Christiana would be computed as follows:

16,256 shares Du Pont $4.50 preferred stock at 71.3125	$ 1,159,256
1,217,290 shares Du Pont common stock at 169.4375	206,254,531
Net Cash as of 5/1/72	5,238,875
	$212,652,662
Less amount distributed to Christiana preferred shareholders (106,500 shares at $100)	10,650,000
	$202,002,662
	OR $17.25 per share

V. *Estimated Federal Income Tax Cost to Christiana Shareholders of Section 333 Liquidation.*

A. *Tax Cost to Preferred Shareholders*

1. *Assumptions*

a. 85% of preferred stock held at basis of $120 to $140 per share (source: Morgan Stanley & Co., study of 1964)

b. Remaining 15% of preferred stock held by taxable non-corporate shareholders at basis of $24 per share

c. Preferred shareholders receive distribution with total value of $100 per share, per terms of Christiana certificate of incorporation

d. Preferred shareholders receive distribution of cash plus DuPont stock acquired from Delaware Realty & Investment Company

2. *Calculations*
   a. Holders of 85% (90,525 shares) of preferred at basis of $120-140
      Tax cost ..... —0—
      (loss)
   b. Holders of 15% (15,975 shares) of preferred stock at basis of $24
      Tax cost
      (1) Dividend of $76 per share
      (2) Assume average tax rate is 50%
      (3) Calculation
      15,975 × $76 × .50 ..... $607,050

B. *Tax Cost to Common Shareholders*
   1. *Assumptions*
      a. 375,640 shares held by heirs of Irénée duPont at basis higher than value of distribution
      b. 81,600 shares held by heirs of H. F. duPont at basis higher than value of distribution
      c. Character of holders of common (see attached exhibits)
         (1) Taxable non-corporate holders 9,954,550 shares
         (2) Taxable corporate holders 280,783 shares
         (3) Exempt holders 1,474,667 shares
   2. *Basic Tax Cost*—assuming DuPont stock acquired from Delaware Realty & Investment Co. is not "acquired after December 31, 1953"
      a. Non-corporate taxable holders
         (1) 458,240 shares held by heirs of Irénée duPont and heirs of H. F. duPont
            Tax cost ..... —0—

      b. 9,496,310 shares held by other non-corporate taxable holders
         (1) Dividend of $6.64 per share
         (2) Assumed average tax rate is 60%
         (3) Calculation
         9,496,310 × $6.64 × .60
            Tax cost $37,833,299
      c. 280,783 shares held by taxable corporate holders
         (1) Capital gain of $6.64 per share
         (2) Assumed average tax rate is 30%
         (3) Calculation
         280,783 × $6.64 × .30
            Tax cost $559,320

C. *Summary—Basic Tax Cost*

1. Preferred stock	$ 607,050	
2. Common stock—non-corporate holders ..	37,833,299	
3. Common stock—corporate holders ..	559,320	
4. Total		$38,999,669

D. *Additional Tax Cost if DuPont Stock Acquired from Delaware Realty & Investment Co. is deemed "Acquired After December 31, 1953"*
   1. Preferred stock ..... —0—
   2. Taxable non-corporate holders
      a. Heirs of Irénée duPont and H. F. duPont ..... —0—

b. 9,496,310 shares held by other taxable non-corporate holders

(1) Gain recognized—$17.25 per share

(2) Capital gain ($17.25 less $6.64) per share—$10.61

(3) Assumed average tax rate is 30%

(4) Computation

9,496,310 × $10.61 × .30	$30,226,755

c. 280,783 shares held by taxable corporate holders

(1) Gain recognized—$17.25 per share

(2) Additional capital gain ($17.25 less $6.64) per share—$10.61

(3) Assumed average tax rate is 30%

(4) Computation

280,783 × $10.61 × .30	$893,732

(5) Summary—additional tax cost

(a) Non-corporate taxable holders	$30,226,755	
(b) Corporate taxable		$38,999,669
holders	893,732	$31,120,487

(6) *Total tax cost*—assuming DuPont stock acquired from Delaware Realty & Investment Co. "acquired after 12/31/53" 11.7 — $70,120,156

Notes—Factors not considered

1. State tax cost.
2. "Tax preference" tax cost.
3. Analysis of holders of preferred stock to take into account changes in facts since 1964 re 15% held at $24 per share basis, *e.g.*, deaths, transfers to charities, etc.
4. Wilmington Trust Co. accounts—full analysis of fiduciary accounts for other charitable and corporate beneficial owners.
5. Analysis of nominee holdings of other than Lack & Lindsay and Mertz & Moyer (Wilmington Trust Co.) and obviously charitable nominees noted on exhibits.
6. Analysis of "administrator" holdings for possible other charitable beneficial owners.
7. Analysis of shares held by owners of fewer than 1,000 common shares (all assumed taxable, non-corporate).
8. Analysis of shares traded since 1964, included in estates (other than Irénée duPont and H. F. duPont) to determine total shares of common held with high basis.
9. Analysis of tax brackets of non-corporate taxable holders.

Thus, it is our best judgment, based on the information available to us, that the approximate federal income tax cost to Christiana's shareholders of a liquidation of Christiana under § 333 would be $39.0 million. In the event that the DuPont stock acquired by Christiana upon the merger of Delaware Realty and Investment Company into Christiana in 1961 must be considered as

having been "acquired" by Christiana in 1961 for the purpose of computing the gain recognizable to Christiana's shareholders under § 333, we estimate that the approximate federal income tax cost of the liquidation to Christiana's shareholders would be $70.1 million.

Very truly yours,

DIVISION EXHIBIT NO. 2B

[Letterhead of]

DECHERT PRICE & RHOADS
1600 Three Penn Center
Philadelphia, Pa. 19102
(215) LOcust 8-1600

July 8, 1972

Mr. Charles C. Townsend, Jr.
Morgan Stanley & Co. Incorporated
140 Broadway
New York, NY 10005

Re: Christiana Securities Company

Dear Mr. Townsend:

Enclosed is a copy of the letter dated July 5, 1972 from Dechert Price & Rhoads to the Special Committee of the Christiana Board of Directors with respect to Section 333 liquidation.

Very truly yours,

/s/ GEORGE W. PATRICK
George W. Patrick

GWP:erk
Enclosure

[Letterhead of]

DECHERT PRICE & RHOADS
1600 Three Penn Center
Philadelphia, Pa. 19102
(215) LOcust 8-1600

July 5, 1972

Mr. A. Felix du Pont, Jr.
Mr. Edward B. du Pont
Special Committee of
The Board of Directors
Christiana Securities Company
3046 DuPont Building
Wilmington, Delaware 19898

Re: *Section 333 Liquidation*

Dear Messrs. du Pont:

This letter will supplement our letter of June 20, 1972 on the above subject.

In our letter of June 20th we expressed our views concerning the feasibility of a liquidation of Christiana Securities Company under § 333 of the Internal Revenue Code, and also set forth the estimated Federal income tax cost of a § 333 liquidation to the Christiana shareholders. That estimated tax cost was based upon a number of assumptions, including the assumption that Christiana's earnings and profits were approximately $85.8 million. The estimated earnings and profits of $85.8 million was a tentative figure supplied to us by Haskins & Sells, whom we had requested to make an earnings and profits study. It may also be noted that we had been informed on April 30th that the Treasurer's Department of the Du Pont Company had made an earnings

and profits study of Christiana and that Christiana's earnings and profits were approximately $96 million. That figure is also contained in a memorandum of May 12, 1972 from the Treasurer's Department to Mr. C. E. Welch, Assistant General Counsel for Du Pont, a copy of which was supplied to us.

Since June 20, Haskins & Sells has completed its earnings and profits study, and a representative of Haskins & Sells, and ourselves, have met twice with representatives of the Du Pont Company and its counsel, Covington & Burling, to explain the methods followed by Haskins & Sells in making its study. At these meetings a number of legal questions affecting the computation of earnings and profits were discussed, and it has become apparent that it will not be possible to agree upon an earnings and profits figure for Christiana. Furthermore, if all of the legal questions discussed were resolved against Christiana, the result would be an earnings and profits figure vastly in excess of $85.8 million.

Because the Federal income tax cost of a § 333 liquidation of Christiana cannot be determined at this time, a § 333 liquidation of Christiana cannot be considered as a viable alternative to the proposed merger of Christiana into the Du Pont Company.

Very truly yours,

DIVISION EXHIBIT NO. 3

pp. 9, 21, 22

MORGAN STANLEY & CO.

Other Mergers of Investment Companies into their Operating Affiliates

We have studied data regarding a number of mergers of registered closed-end investment companies or holding companies into their operating company affiliates. Such mergers have occurred frequently in the past. Based on our studies we believe several conclusions may be drawn:

1) Generally, the market values of the investment companies (where a market value existed) were at a discount from the underlying net asset values prior to the merger negotiations. Nevertheless, net asset value rather than market value of the investment company was regarded as the relevant consideration in determining the exchange ratio.

2) In the instances reviewed by us the acquisitions were consummated at exchange ratios which ranged from a premium over net asset value (as defined in the particular case) to a discount of about 1.8% from net asset value of the acquired company. However, many of such acquisitions were consummated at what appears to be net asset value. The merger of Delaware Realty into Christiana in 1961, which is an important precedent, involved a discount of 1.5% from Delaware Realty's net asset value, but, because of the size of Delaware Realty's holdings of Christiana, the effective discount was approximately 1%.

3) In the case of registered investment companies, the Securities and Exchange Commission found, as required pursuant to Section 17 of the Investment Company Act of 1940, that the merger terms were reasonable and fair and did not involve overreaching on the part of any person concerned.

III. Conclusion

In your letter to us of June 6, 1972, you requested that we advise you as to a range of ratios of exchange of Du Pont common stock for Christiana common stock which we consider fair and reasonable to both Du Pont and Christiana stockholders. For purposes of our analysis herein we have considered Christiana's Adjusted Net Asset Value and discounts or premiums in relation thereto. Such views may be converted to definitive share exchange ratios by means of a formula which could be incorporated in the merger agreement.

In light of the foregoing analysis of the proposed merger it appears that Christiana probably would not be justified in accepting a discount, in the form of market value of Du Pont common stock, greater than what would be received in a Section 333 liquidation. On the other hand, it appears that Du Pont, even though it might receive some intangible benefits, probably should not agree to an exchange of shares which would recognize more than Christiana's Adjusted Net Asset Value (no discount) since such a merger would result in a financial loss to its common stockholders.

Based upon the above, values in the range of Adjusted Net Asset Value (no discount) to a discount in the area of 2.84% would appear to represent the widest range within which negotiations should be conducted. How-

ever, we believe that it is desirable to narrow this range and that, in view of the relative advantages of a merger to the two parties Christiana should offer some monetary inducement to Du Pont to merge. In our opinion, therefore, an exchange ratio which recognizes a discount from Christiana's

Adjusted Net Asset Value in the range of 0.5% to 2.0% would be fair and reasonable to both Du Pont and Christiana and the shareholders of each such company and would not represent an overreaching by either party. Assuming that the Christiana preferred stock is redeemed at $120 per share, and based upon a market price of 170¼ for Du Pont common stock as of May 31, 1972, each share of Christiana common stock would receive from 1.14524 shares to 1.12788 shares of Du Pont common stock at such discounts.

Proceeds of tax claim

We also have been asked to recommend a basis for computing the amount of Du Pont common stock to be distributed to Christiana common stockholders of record for purposes of the merger upon receipt by Du Pont of any payment in settlement of the tax claim of $21.0 million. Neither the amount of any recovery nor the time of any such recovery is known at this time. We believe it is desirable that some method of computing the number of Du Pont common shares to be distributed to the Christiana common stockholders should be decided upon which would result in the Christiana common stockholders receiving promptly after any payment of the tax claim to Du Pont, shares of Du Pont common stock with a market value at the time closely approximating the dollar amount of the refund. In other words, any change in the market price of

Du Pont common stock between the record date for the merger and the time of the receipt of any recovery should neither penalize the Christiana common stockholders nor give them a windfall. We also believe that Du Pont should not be placed in the position of distributing at the time Du Pont common stock with a market value either greater or less than the amount of any recovery.

DIVISION EXHIBIT NO. 9

LIST OF DOCUMENTS
FOR FINANCIAL ADVISOR

1. *Du Pont Data*
   - (a) Annual Reports: 1967-71
   - (b) 10-K's: 1967-71
   - (c) Proxy Statements: 1968-72
   - (d) Quarterly Report to Stockholders: 1st quarter 1972
   - (e) 10-Q: 1st quarter 1972
   - (f) Registration Statements filed in 1972:
     - (i) Amendment No. 4 to Form S-8
     - (ii) Amendment No. 2 to Form S-7 (filed on Form S-16)
   - (g) Historical background data:
     - (i) The Organization of the Du Pont Company
     - (ii) The Du Pont Company: A Brief History
   - (h) Final Judgment in U. S. District Court re GM divestiture (3/1/62, as amended 4/26/62)

2. *Christiana Data*
   - (a) Annual Reports: 1967-71
   - (b) N-1R's: 1967-71
   - (c) Proxy Statements: 1968-72
   - (d) Certificate of Incorporation (as last amended 1/16/61)
   - (e) By-Laws (as last amended 8/16/71)
   - (f) Proxy Statement re merger of Christiana and Delaware Realty and Investment Co. (1/24/61)
   - (g) SEC data re Christiana/Delaware Realty merger:
     - (i) 1940 Act application (11/23/60)
     - (ii) Amendment to 1940 Act application (12/16/60)
     - (iii) Notice of Filing (12/19/60)

   - (iv) Opinion and Order (1/13/61)
   - (h) Historical background of Christiana Securities Co.
   - (i) Prospectus for General Motors exchange (1/12/65)
   - (j) Prospectus for Hercules exchange (3/15/67)
   - (k) The News-Journal Company financial statements at 12/31/71
   - (l) Wilmington Trust Company:
     - (i) 1971 Annual Report
     - (ii) 1972 Proxy Statement
     - (iii) Quarterly Report to Stockholders—1st quarter 1972

3. *Other Data*
   - (a) Memo dated 5/12/72 to Assistant General Counsel of Du Pont re "Possible Merger of Christiana with Du Pont"
   - (b) Memorandum re Judicial Precedents for Similar Transactions
     - (i) "SEC and Judicial Precedents Respecting the Proposed Du Pont-Christiana Merger"—6/6/72
     - (ii) "Analysis of Similar Transactions Under the Investment Company Act of 1940"—6/15/72
   - (c) Letters re Section 333 Liquidation
     - (i) "Re: Section 333 Liquidation"—6/20/72
     - (ii) "Re: Section 333 Liquidation"—7/5/72
   - (d) Classification of Holders of Christiana Common Stock
   - (e) Memorandum "Re: Du Pont-Christiana Merger—Appraisal Proceedings Under the Delaware Corporation Law", S 262
   - (f) Letter re Christiana Tax Claim to Mr. S. S. Arsht from Mr. R. D. Williams dated 6/6/72

DIVISION EXHIBIT NO. 10

PROPOSED MERGER OF
CHRISTIANA SECURITIES COMPANY INTO
E. I. DU PONT DE NEMOURS AND COMPANY

Some Prefatory Remarks for
Meeting in New York at FDC on June 23, 1972

1) We are delighted to have this opportunity of reviewing our thinking (and subjecting ourselves to rigorous examination) with respect to an outline of a financial plan for the merger of Christiana into the Du Pont Company.

2) Our view, as developed to date, is that the principal (if not only) advantage of the proposed merger to the Du Pont Company is the prospective termination of the affiliation with Christiana under the Investment Company Act of 1940, and yet

a) since the Du Pont Company has apparently dealt with the related obstructions and inconveniences for 32 years, while successfully conducting its business, and since

b) there appears a likelihood that in any event Christiana in its own interests will disappear (through liquidation, if not merger),

c) we see no apparent reason why the Du Pont Company should (or should be expected to) make any offer to accomplish the merger which would impair or dilute earnings or other values presently accruing to shareholders of the Du Pont Company.

3) With respect to Christiana, it seems to us that that Company i) has lost (or outlived) its *raison d'etre*, ii) has very limited options (particularly since the 1969 Tax Act) for overcoming its inherent handicaps, and iii) will realize quite tangible advantages immediately upon merger into the Du Pont Company on almost any terms that the Du Pont Company might reasonably offer.

4) In light of these considerations it seems significant (but in any case understandable and appropriate) that it has been Christiana which initiated the conversations looking to a merger.

5) Nonetheless, while there is every reason for the Du Pont Company to insist that any merger be without cost to itself, we see no reason why the Du Pont Company should seek advantage from the tax penalties faced by Christiana were it to liquidate rather than merge. Nor do we see any reason why the Du Pont Company, always assuming its interests are properly protected, should adopt a negotiating position so harsh as, in effect, to leave Christiana no alternative but to liquidate.

6) Therefore, we have sought to develop a financial plan that would be without cost to the Du Pont Company and yet offer attractive financial inducements to Christiana shareholders affirmatively to approve a merger. Were a Du Pont offer to be appreciably less attractive than the liquidation alternative available to Christiana, there would be no point in pursuing the negotiations.

7) A further reason for pursuing the negotiations with Christiana, it would seem to us, is that if a merger can be accomplished within the framework outlined above, it will result in a dispersion of the concentrated interest of Christiana in the Du Pont Company. While

we do not see this as an end in itself, it is commonly regarded in roughly similar circumstances as a collateral corporate gain.

8) We should now like to review with you *drafts* of

a) an opinion letter, and

b) a supporting "Study".

We particularly want to go over with you the accuracy and validity of the assumptions we have made, and which are set forth in the "Study". They have a very basic importance for our conclusions and the recommendations we propose to make.

E. T.
6/22/72

DIVISION EXHIBIT NO. 12

pp. 10-11

– 10 –

Net Asset Value—Net Asset Value, as defined in an earlier paragraph, is not a useful concept for measuring the going-concern value of an operating company such as Du Pont for much the same reasons as is the case with its book value. However, in our opinion, it is the relevant measure of value for Christiana in the analysis of this merger. Psychologically, we believe that it is the value the Christiana stockholder perceives himself as holding, although there may be structural impediments which prevent him from realizing it as Christiana is currently constituted. Furthermore, there are at least three alternatives by which Christiana can approximate this value for its shareholders acting on its own. The first alternative is the Section 333 "one-month" liquidation which virtually duplicates the results of this merger for the Christiana shareholder. We are informed by counsel that, given an 80% shareholder election, Christiana could liquidate and distribute its assets to its shareholders who would then be taxed to the extent of their ratable share of Christiana's "accumulated earnings and profits" as defined by the Internal Revenue Code. We have received an opinion indicating that such a tax would be on the order of 1.7% of the average Christiana shareholder's Net Asset Value, and that the required canvassing of shareholders does not pose an insurmountable problem. Somewhat in contrast to the merger, however, this procedure could cause some market pressure on Du Pont stock in a short period of time with consequent market

effects, if Christiana holders liquidated portions of their holdings to meet the tax liability. In our view, the minor disadvantage of this income tax does not indicate a discount in Net Asset Value for the Christiana shareholder since it is well offset by other factors discussed in this report.

The second alternative available to Christiana is to solicit an alternate merger partner in the form of another operating company or another investment company. The business, financial and legal difficulties are admittedly large and the time horizon probably extended. However, the possible interest of an aggressive management in an unrelated industry, a foreign company or other investment companies must bear some weight in the face of numerous examples of successful tenders for large companies by aggressive smaller concerns, instances of foreign control of major American businesses, and mergers of large investment companies.

The third alternative is one whereby Christiana would establish an optional plan for the payment of cash dividends to a trustee in lieu of a stockholder, similar to the plans presently offered by at least two other closed-end investment companies. Acting on behalf of the stockholder (who remains liable for taxes on the dividends), the trustee converts the cash dividend to a stock dividend through purchases on the open market.

MURTAUGH EXHIBIT NO. 2

Excerpts From Testimony on Second Remand From the United States Supreme Court, *United States v. Du Pont*, 177 F. Supp. 1 (N. D. Ill. 1959), as Found in Printed Record in *United States v. Du Pont*, 366 U. S. 316 (1961), pp. 1053-57, 1506-07, 1516-17, 1558-62, 1739, 2095.

DR. IRWIN FRIEND, Wharton School of Finance.

1053

primarily interested in, is what is going to happen to these shareholders whose securities have to be sold, either by judicial fiat or because of tax impact, if our tables showed the difference in market price between the day preceding the public announcement of the offering and the low point within the year after the security was offered rather than take the arbitrary date of two, three and one month before the offering, and compare all this with the final date one year after the offering?

A. I may be misunderstanding your question, but are you implying that a fair basis of assessing the market impact of a new offering would be to go from the day prior to the public offering to the low point in the subsequent year?

Q. The low point after the public offering until it shows that it is recovering from the public offering?

A. You mean disregarding completely the fact that stocks will fluctuate for any number of reasons, and you might as well take the high point as the low point?

[fol. 1019] Q. Oh, no. I think you may properly adjust as against the market during that same period to see whether a market is up or down.

A. But you will take that precise day when the stock is lowest relative to the market? If this is your question, I think it is most unfair and biased. I would think it is

equally biased to go to the high point of that stock relative to the market in a subsequent year. Stocks fluctuate for a variety of reasons.

Q. Do you know what the average period of time after a public offering is before the stock usually has recovered from the impact of the public offering?

A. This varies with the stock. I think normally if you take a period as long as a year to fifteen months, you would have covered this period quite adequately. There may be exceptional cases where this would not be true.

Q. Doctor, isn't it of rather academic interest to the du Pont shareholders who are going to receive the distribution of this General Motors stock and have it sold on the market, whether the stock recovers 15 months from the last day of the month, 15 months from the date or 12 months from the date? Aren't they more interested in where and at what market price their shares are going to be sold?

1054

A. Let me say that I think there is a lot in what you say, but if I understand the inference that you are drawing, I believe this to be completely incorrect.

Actually, if you take a look at the exhibit, you will find that only a small part of the effect on price occurs in the [fol. 1020] period of offering. So that actually the average effect in the month of offering would typically be less—again on the average—than for the period which I took, which I thought was fair—a longer period.

Q. Don't you think that the effect really begins with the day that the public announcement is made that the shares are to be offered?

A. I think——

Q. Following the registration statement of a registered issue?

A. I think there is some effect starting then, yes.

Q. And in most cases, doesn't the period of three weeks to a month intervene between the date the registration statement is filed and the news becomes public, and the date of the public offering?

A. Yes.

Q. And in the average case or in most cases, isn't the impact of a further drop largely confined to a period of one to three or four months following the offering?

A. This I am inclined to disagree with. This I think, is much more variable. Frequently this is true. Frequently you have to go, I think, for as much as a year before you get the full impact.

Q. You will agree, though, Doctor, that it isn't very much comfort to the du Pont shareholders whose shares are going to be sold to find out some few months later that the market is recovering?

A. I agree completely and it is for this reason I broke up the periods the way I did.

Mr. Dallstream: I have no more questions.

Mr. Cowen: Your Honor, I have just one question.

The Court: You may inquire.

[fol. 1021] By Mr. Cowen:

Q. Did I understand you to say, Doctor, that you did not take into consideration how many shares of General Motors, for instance, were traded on the market in pre-

1055

ceding periods of a year, two years, or five years in considering your answers?

I think you said you related it to the total of the outstanding shares of stock, but not as to how many shares were traded on the market, is that correct?

A. Yes, that is correct.

Q. Do you know that there was an average of some 6 or 7 million shares of General Motors stock traded on the market out of the 280 million shares issued?

A. This is on the New York Stock Exchange, yes.

Q. Do you know if you increase that by a third, by taking two million shares, don't you think that would have some effect? Instead of relating it to the 280 million shares, shouldn't you have related it to the amount of shares traded on the market?

A. Let me answer that completely.

First of all, just to get the data more accurate, my best recollection is that 7 million shares represents the average sold on the New York Stock Exchange in recent years.

As I recall, you had another couple of million shares on other exchanges. We don't know how much was sold on the over-the-counter markets, but if you use the normal [fol. 1022] blow-up of about a third, this would be nine and a third, and this would be 12 million shares a year.

Q. I don't know that it is that much.

I understood it was much less, but nevertheless, go ahead.

A. One part of this is a matter of record. The amount sold on exchanges other than New York, I think you will find 2 million is a pretty good figure.

In addition, you do have the over-the-counter area, and I am just using the average number to blow up by—I admit I don't know whether it is larger or smaller—so maybe it is a dimension of 12 million.

Now, I would say it would be relevant to indicate in all of these cases, not only in the General Motors case, what would be the relationship of the increase in stock to the volume of trading.

But I would say also that, in my opinion, it is less relevant than relating it to the outstanding. I mean, the

fact that you have people who do not want to sell stock is presumably relevant to price-making.

Q. At any rate, you did not consider it—the latter, I mean?

1056

A. There are a number of things which it would have been desirable to do in addition to what was done here, and had the Government had the time and resources, I certainly would have recommended at least that they do it.

Q. I assume they have the resources. I don't know about the time.

A. This is not completely clear, I understand.

Q. Would you consider, Doctor Friend, that if the Government's plan went through and some two million [fol. 1023] additional shares were sold on the market by reason of the tax impact, stockholders who are forced to sell, added to the two million which would ordinarily be sold, you now have four million shares of stock, and compared to the stock sold on the New York Stock Exchange you now have a 60 or 70 per cent increase in amount of shares ordinarily traded.

You didn't take that into consideration either.

A. I must confess I don't understand your arithmetic.

Why are you comparing the four million to seven million rather than the 12 million?

Q. Compared to the 12 million then.

It still amounts to an increase of a third, which is quite an increase in any one year, and this is to be continued and repeated over a period of ten years.

You did not, however, consider that in your studies, as I understand it.

A. Those data are not reflected in this particular exhibit.

Mr. Cowen: That is all.

The Court: Any other questions?
Is there any redirect?

Mr. Reycraft: Yes, your Honor.

Redirect examination.

By Mr. Reycraft:

Q. Dr. Friend, in expressing the opinions you have, did you rely solely on this Exhibit 293 for identification?

A. As I think I explained this morning, I was relying on other data as well. The first such body of data was that [fol. 1024] very small scale study which I carried on in early 1948. Then, secondly, just observation of the market generally. I think—let me rephrase that—it is my impression that most analysts have found it rather difficult to find much of an impact in stock price associated with rather moderate increases in outstanding stock.

Q. This exhibit which you asked to have prepared, consists entirely, does it not of situations where there is an imbalance of supply and demand?

A. I am sorry——

Mr. Cox: May we have the question read, please?

(Question read.)

By Mr. Reycraft:

Q. By definition, does it not include that?

A. Yes.

Q. And that is the purpose of it and the relevance of it, is it not?

A. Yes.

Q. Now referring to the General Motors rights offering, which is indicated on this exhibit, and referring to Column 5 and referring to all of the data on this line, are you able to discern any market impact by reason of the volume of stock which came on the market through this offering?

A. Well, let me be repetitious, since it is highly relevant. It is extremely difficult to conclude much from an individual stock experience, but surely these data give no indication of any significant impact of this particular rights offering on the market.

Q. I believe the record shows, but I am not sure that the question is clear on this point which was asked on cross, that this rights offering involved something in the neigh [fol. 1025] borhood of 4½ million shares of $5 par value stock and approximately 13½ million of 1⅔ par value stock. Do you think that the experience in this offering has any usefulness in this proceeding in terms of forming a judgment as to what the market impact of a stock divestiture will be?

Mr. Cox: I object to the form of the question. He may ask the witness whether he has an opinion based on his experience, I believe.

SUMNER EMERSON, Partner, Morgan Stanley & Co.

1506

the Aluminium situation; it was purely a matter of selling Aluminium stock.

In the case of General Motors, however, there would be [fol. 1597] heavy selling, as we have estimated, well over a million shares a year by du Pont stockholders.

Q. Mr. Emerson, do you have any opinion on the question of whether the offerings of the stock of Aluminium Limited over the period of time between 1951 and the present date has had any impact on the market value of the common stock of that company?

A. I believe that it has.

Q. Now let me direct your attention again to du Pont Exhibit 32 for identification, which is the table of secondary offerings; and I note that on this table you have computed at the extreme right of the table——

Do you have it before you, Mr. Emerson?

A. Yes, sir.

Q. (Continuing)—a market impact by comparing the percentage change in the average of the week's closing prices, four weeks before the offering to two weeks after the offering?

A. Yes, sir.

Q. For each issue. And then you have computed an average impact, and you have done that in two ways: one, including Upjohn, and one excluding Upjohn.

Why did you prepare the chart in that way, Mr. Emerson?

A. Well, the Upjohn impact was so much out of the ordinary that if I included it in the averages, without showing what the average would be without it, I was sure I would be questioned about it, so we showed it both ways.

I think the fair figure is the one with Upjohn, which is the higher figure. Any secondary can have an unusual impact, and Upjohn did; and I see no reason why it should be excluded from the averages. But we did show it both ways.

[fol. 1598] Q. Why did you include Upjohn in the upper part of the chart rather than in the lower part of the chart, under the heading, "No previous public market?"

A. Because it had a public market.

Q. Was there a public market for Upjohn prior to the offering?

1507

A. Prior to the announcement of the Upjohn financing, there was a very thin market. Then the Upjohn Company split its stock 25-for-1, or rather, it wasn't a split; it was a recapitalization in another State, and an issuance of 25 shares for each old share.

The market then began to pick up, but it was still an uninformed market. Until the registration statement was filed, the only way you could know the earnings and assets of the Upjohn Company was to be a stockholder and get their annual report; it was not in any of the Services.

However, once the registration statement was filed, there became a very active market in Upjohn. Well, there is a document used in Wall Street called "the pink sheets," in which over-the-counter dealers list their bid and asked—the price they bid and the number of shares they bid for, and the same on the asked side.

After the registration statement was filed and people knew what the figures of the Upjohn Company were, the number of dealers in the pink sheets every day would run anywhere from 20 to over 40.

Well, that certainly shows an active market, so that at the time the Upjohn offering was made, and for a period of three weeks before then, there had been a very active market; you could trade almost any reasonable amount.

Q. Do those figures in the pink sheets to which you [fol. 1599] refer reflects bids and offers?

A. Bids and offers, by dealers in the over-the-counter market.

Q. Do you recall, Mr. Emerson, how the price of Upjohn moved after the secondary offering of the stock?

A. It went down—at the time of the offering—the day that Upjohn's stock was offered at 45, the over-the-counter

market was right around 50. It went down quite rapidly after that; and it is now, the last I saw it, it was about 41.

Q. What percentage of the outstanding stock, if you know, of the Upjohn Company was included in that secondary offering?

A. About 17 per cent.

Q. Mr. Emerson, let me direct your attention again to du Pont Exhibit 32 for identification and to these figures that show the average impact of the secondary offerings

1516

A. That is correct. An actual loss, not a paper loss.

Q. An actual loss.

Directing your attention to the impact figure that covers the period of time that extends two weeks after the offering, would that figure also be significant, or would it not, to any person who for any reason sold his stock in the interval of time elapsing between the date of offering and two weeks after the offering?

A. Well, the market price is of great significance to anyone who for any reason has to sell; and if the market has gone off after the offering of these secondaries, and some holder of the security involved for any reason has to sell in that period, he receives that much lower price.

Q. Let me direct your attention to the secondary offerings that are listed on du Pont Exhibit 32 for identification, Mr. Emerson; and with those offerings before you, I should like to ask you whether, in your opinion, any of the secondary offerings that are listed in that exhibit created market problems that are comparable to market problems that, in your judgment, would be created by the execution of the proposed Government Plan?

A. None of them.

Q. Now I note on Exhibit 32, as you have testified,

you have computed the average impact of these offerings considered collectively.

In the light of your previous answer, I ask you whether, in your opinion, the average figure is meaningful and, if so, how, in determining the probable market impact of any particular offering of any particular stock in the future?

[fol. 1612] A. There is no such thing as an exact yardstick for measuring the impact of a marketing operation. The figures, all show that there is an impact there, but you can't predict in advance exactly what it is going to be. There is no such thing as a slide rule computation.

For instance, in that exhibit, the first six items listed at the top of the page are all roughly the same size; they are between thirty and forty million dollars; and yet the market impacts—well, in the impact at the time of offering, Caterpillar Tractor was decimal point three, whereas Monsanto was six point three. You simply know that there is going to be an impact, but you cannot tell exactly what it is going to be.

Q. In your opinion, by averaging the market impacts of

1517

the first seven of those secondary offerings that have been listed in the upper part of du Pont Exhibit 32 for identification, would you have been able to predict with certainty what the impact of the eighth one, the Upjohn offering, was?

A. No. We had no knowledge of what the impact in the Upjohn offering was going to be.

Q. At least the computation of the average impact for the earlier offerings did not provide a mechanical test of what the impact of the Upjohn offering was?

A. That is correct.

Q. Again directing your attention to Exhibit 32 for identification, Mr. Emerson, and to the average impact figures which are shown there, both with respect to period of time up to the offering price and the period of time two weeks after the offering, I ask you whether, in your opinion, the impact of the proposed Government plan on the market price of common stock of General Motors would be greater or less than the average impacts computed on the [fol. 1613] exhibit?

A. In my opinion, it would be materially greater.

Q. What are your reasons for that answer?

A. In the first place, each offering by the trustee would be larger than any of those shown at the top of the Exhibit 32, with the exception of Upjohn. In the second place, the offerings by the trustee would be competing; they would be made in a market that was filled with offerings of General Motors stock, because du Pont stockholders were selling General Motors stock for tax reasons. We estimated that that would be a minimum of a million and a quarter shares a year that du Pont stockholders would be selling—a million and a quarter shares of General Motors. And, third, under the Government plan, there would be one of these offerings every year for ten years. The overhang would be terrific.

Q. Mr. Emerson, considering the question of the impact of the Government's plan of market price of General Motors, did you consider the extent to which there may be a latent demand for the common stock of General Motors in the market?

A. Well, there is always a latent demand for any good stock at a price.

Q. I am asking you to what extent you considered the

Is that what you mean?

1558

income. But it had earned more than that in the two preceding years, and $5.00 a share earnings seemed a fair figure.

We assumed that du Pont would then pay approximately its usual percentage of its earnings in dividends. The assumption used was 65 per cent, so that that meant we took into these computations a dividend from du Pont of $3.25 a share.

Mr. Bushby: I would like to offer these exhibits, Christiana Exhibits 9 and 10, in evidence.

The Court: Any objections?

Mr. Reycraft: I understand that these exhibits are similar to Exhibits 6, 7 and 8, and are merely mathematical computations based on certain assumptions?

The Witness: That is correct.

[fol. 1665] Mr. Reycraft: No objection.

The Court: They are admitted.

(Said documents, so offered and received in evidence, were marked Defendant Christiana Exhibits 9 and 10).

By Mr. Bushby:

Q. Mr. Emerson, in the case of the asset calculations, Christiana Exhibits 6, 7 and 8, nothing is shown there by way of an item of loss for any reduction in the value or market price of the du Pont stock owned by either Christiana and Delaware, is there?

A. There is none. The only loss is from the forced sales of the General Motors at a reduced price, because of the market impact.

Q. Mr. Emerson, I would like you to make a different assumption now. I would like you to make the assumption that legislation is passed which would permit a tax-free

distribution of the General Motors shares by du Pont, which would then require the recipient to spread or apportion his tax base cost over the shares of du Pont he retains and his shares of General Motors he receives.

I would like you to assume that under such legislation there is a single tax-free distribution by du Pont of a whole block of 63 million shares of General Motors.

Secondly, I would like to have you assume that there is a Court order entered at the request of the Government requiring Christiana, Delaware and the stockholders of Dela-

1559

ware to hand their stock over to a trustee and require the trustee to make ten annual equal sales of that stock, and that there will take place other sales of General Motors [fol. 1666] stock distributed in that period for whatever reasons that you think such sales would take place.

I would first like to ask you if, under such an order, you think that there would be sales of the stock received by du Pont stockholders other than Christiana and Delaware and the stockholders of Delaware?

A. Yes, there would be.

Q. From what source would they come, in your opinion?

A. Well, 43 million approximately shares of General Motors would be divided among the du Pont stockholders proportionately at one time.

Now, the stockholders of du Pont bought du Pont because they liked du Pont, and some of them might feel that they had all the General Motors they wanted. Some of them may not like General Motors.

For a variety of different reasons, even though there is no tax impact, there would be some selling of General

Motors in addition to any impact from the sales by the trustee.

Q. I don't want to be mysterious. You understand that my hypothetical question is directed to legislation such as the Frear Bill which has been introduced in the Congress?

A. Yes. I understood that this distribution would be tax-free.

Q. Yes. Now, have you formed an opinion as to the effect upon the market value of General Motors stock of the carrying-out of such a decree under such legislation?

A. Yes. It initially would be in the area of 15 per cent, in my opinion.

Q. 15 per cent off?

A. Yes. Well, unless the rest of the market went up 15 per cent, and then it could stand still.

Q. 15 per cent against what General Motors would otherwise sell at any given time?

A. That is right, yes, sir.

[fol. 1667] Q. Have you an opinion how much General Motors would sell off, if any, following the initial period of selling by other recipients of the GM stock besides Christiana, Delaware and the stockholders of Delaware?

A. Well, as I understand your question, you are assuming sales by the trustee regularly.

1560

Q. Right, ten annual sales.

A. Ten annual sales, yes.

The largest part of the General Motors selling by du Pont stockholders would come the first year.

If, for any reason, they don't want to hold du Pont, they presumably would sell it within a reasonable length of time.

Q. I understood your answer related to the first period, the first part of the period, the 15 per cent.

A. My 15 per cent estimate was for the first part of that period.

Q. Now, what is your estimate for the latter part of the period after that selling is over?

A. You would still have the annual impact of the trustees' sales, and my estimate of the impact in that case would be in the range of 10 to 15 per cent.

Q. Now, in making your estimate, you have made certain assumptions, have you not, as to present conditions continuing, as to the same price levels in the stock market, as to there being no substantial change in the automobile industry, and that the status of General Motors in the industry will not worsen, is that correct?

A. That is correct, all of those are assumed.

Q. There have been some severe declines in the stock market, have there not, since World War II?

A. Yes, sir.

Q. There have been severe declines in the price of General Motors stock in the 12 years or more since World War II?

A. Yes, sir.

[fol. 1668] Q. If those declines occur again at a time when the trustee's sales were taking place, would not the market impact be greater than that you have testified to here?

A. Yes.

Q. You have testified that trustees' sales will hamper equity financing by General Motors?

A. Yes, sir.

Q. Isn't there some chance that that would impair General Motors position in the motor car industry in the next ten years?

A. From that cause alone it could happen. If General

Motors isn't free to do the type of financing that it ought to do, and therefore, it does not expand in the way that it otherwise would have expanded or it does not develop in the way it otherwise would have developed it might hurt the competitive position of General Motors Corporation.

Q. Do you believe with Mr. Shanks who testified here that General Motors cannot go on doing debt financing indefinitely?

A. No company can.

Q. So that if those conditions exist it would undermine one of the assumptions that you have made as to his market impact of 15 per cent. If General Motors was hampered the market impact might be greater than 15 per cent?

A. That is correct.

Q. Have you made any computations of asset loss to Christiana and Delaware such as you made on the assumption that the Government decree would go into effect showing the asset loss on this other assumption you have just made about tax-free distribution and ten years of sales.

You have not, but I am just——

A. I don't recall it.

Q. Referring now to Christiana Exhibits 6, 7 and 8, would the results shown there as to asset loss under the [fol. 1669] column headed "15 per cent" be applicable generally to the second assumption that you have a tax free distribution and ten years of sales by a trustee for Christiana, Delaware, and the stockholders of Delaware?

A. No.

Q. Would it be slightly different?

A. Well, it might be materially different.

Q. Why?

A. In the first place, the dividend tax would not be applicable.

Q. Right.

A. In the second place, the capital gains tax would be computed on quite a different basis.

Q. But it would not result in a very different figure, given this order of figures, would it?

A. It would result in lower capital gains taxes.

Q. Slightly lower?

A. Slightly lower.

Q. You have, have you not, made computations of the

1562

pro-forma income, annual income of Christiana and Delaware on this second assumption of a tax-free distribution and ten years of sales by a trustee, Mr. Emerson?

A. I have.

Mr. Bushby: I should like to mark for identification as Christiana Exhibit 11, a tabulation headed, "Christiana Securities Company Pro-Forma Income Statement, Assuming Completion of the Forced GM Sales and the Reinvestment of the Proceeds Therefrom Under a Tax Free Distribution of Such Shares."

(Thereupon said document was marked Defendant Christiana Exhibit No. 11, for identification.)

Mr. Bushby: I would also like to mark for identification as Christiana Exhibit 12, the similar tabulation for Delaware Realty and Investment Company.

[fol. 1670] (Thereupon said document was marked Defendant Christiana Exhibit No. 12, for identification.)

By Mr. Bushby:

Q. Mr. Emerson, have you before you Christiana Exhibit 11?

A. Yes, sir.

Q. Would you state what that tabulation shows?

A. Well, this is a reconstruction or a projection, rather, of the Christiana income account ten years hence after the completion of the trustee sales.

Q. After a tax-free distribution?

A. After a tax-free distribution, but the trustee would still be making his annual sales.

Q. And what income does it show for that 11th year as contrasted with actual income of Christiana for 1958?

A. The projection shows earnings of $50,616,862 as against the actual earnings—these are in both cases on the common stock—for 1958 of $67,495,671, which is exactly a reduction of 25 per cent.

Q. Now looking at Christiana Exhibit 12 for Delaware Realty, what does that show as to comparative income after a ten-year period?

A. This is a reconstruction of the earnings statement of Delaware Realty ten years hence or at the conclusion of

DEAN NEIL JACOBY, U. C. L. A. Graduate School of Business.

1739

basic economic effects of the adoption of the Government plan on General Motors?

A. They would be similar, I believe, to those that would occur with respect to the du Pont Company. If, for example, the price of General Motors stock should be depressed by a factor of 20 per cent under the level it would otherwise reach, this would mean that the cost of capital to General Motors would increase by 20 per cent; or, to be specific, if General Motors would have been able, in the absence of the plan, to have sold stock for, let us say, $50 a share, paying a $2.00 dividend, equity capital in effect is costing it four per cent. If now, as the result of the plan, the stock were to be depressed to, say, $40 per share, equity capital would now cost it five per cent; and

this would be a penalty that General Motors would have to bear, a handicap, as compared with other business corporations with which it is competing for capital.

And as a result of that disadvantage, again, one could [fol. 1891] expect over time some distortion in the allocation of resources among competing business firms in the economy, as the result of which there would be a dampening down of aggregate output or production.

Q. Dean Jacoby, let us assume that the Government plan, instead of being carried out over a 10-year period, as the Government proposes, would be carried out over a period of 15 or 20 years. To what extent would that change in the proposed plan lead you to modify the opinions that you have expressed with respect to the economic and financial consequences of the execution of the plan?

A. In my opinion, the extension of the execution of the plan over a longer period than ten years, would have moderately favorable consequences from the point of view both of the market price of General Motors and du Pont stock, and also from the point of view of their ability to compete for funds in the economy.

I think that this favorable consequence would come about because, in the first instance, a longer time available to du Pont and the trustee to distribute stock would afford a larger number of favorable market opportunities for disposing of General Motors stock, and also a longer period would be provided to the du Pont Company to search for and discover and exploit new investment opportunities.

Q. In reaching the opinions that you have expressed

to have the same degree of impact as there would during a twenty-one day waiting period.

Q. But if you have the twenty-one day waiting period, with a registered secondary, then something happens—you have to withdraw it, and that is a very bad black eye, isn't it?

A. Yes, with that stale or warmed over business it is very difficult to revive buyer interest and demand to the degree that you had it initially. It does have an adverse effect.

Q. Mr. Lenz, I would like to have you make one other assumption. I would like to have you assume that legislation such as the Frear Bill passes, which would make a distribution of the General Motors stock pursuant to a [fol. 2344] court decree by the du Pont Company tax free. And assume a distribution of the whole 63 million shares takes place in one year, but also assume that the Government still insists that a trustee be appointed and that the shares distributable to Christiana and Delaware and the stockholders of Delaware, and also the shares owned by Christiana, be sold in ten approximately equal annual installments.

What do you think the effect on the market price of General Motors stock would be under those assumptions?

A. In other words, you are asking me, Mr. Bushby, what the effect would be of these annual sales of two million shares if the distribution were made on a tax-free basis?

Q. In one distribution?

A. In one distribution.

Q. Because I am assuming that the corporation wouldn't wait to see whether the Frear Bill would be repealed.

A. I think there would be an adverse impact to the extent of, roughly, 10 to 15 per cent, based on studies of other secondary offerings, and in particular the Sloan

BEST COPY AVAILABLE

Foundation distribution of 1,300,000 shares, where the impact was roughly close to five per cent.

Now it might be possible that there would be a little higher percentage resulting from some sales, from the people who are getting General Motors, who don't want General Motors, or who have too much General Motors now. That might add a little bit, but I wouldn't be able to esti-

MURTAUGH EXHIBIT NO. 4

CONFIDENTIAL
Requested by Counsel
Copy No. 22

May 12, 1972

To: C. E. Welch
Assistant General Counsel

From: Treasurer's Department

Possible Merger of Christiana Into Du Pont

This memorandum has been prepared, at your request, for the aid and guidance of counsel in connection with the possible merger of Christiana Securities Company into the Du Pont Company. Appropriate members of the Legal Department staff were consulted on corporate law, tax law, and other legal aspects of the matter.

Du Pont and Christiana recently appointed special committees of their respective Boards to consider a possible merger of Christiana into Du Pont. These committees are expected to make recommendations on the matter to their Boards before the end of 1972, after considering advantages and disadvantages of a merger and discussions regarding acceptable terms. Any plan of merger would be subject to shareholder approval and to obtaining a favorable Federal tax ruling.

This memorandum summarizes pertinent background information, outlines general procedures that might be followed to effect the merger, and discusses certain specific aspects of the matter requiring particular attention.

1. *Background Data*

Christiana (a Delaware corporation) is a closed-end, nondiversified management investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940. Securities and cash (and a tax claim) comprise the entire assets of Christiana. Securities held include 28.3% of the outstanding shares of Du Pont common stock and about one percent of the outstanding shares of Du Pont $4.50 preferred. In recent years this holding of Du Pont common stock has represented 99% of Christiana's total assets. Security holdings of Christiana are listed below:

No. of Shares	*Company*	*Value at May 1, 1972*	
		Carrying Value	*Market Value*
13 417 120	Du Pont, Common	$74 621 915	$2 222 210 500*
16 256	Du Pont, $4.50 Pfd.	1 298 056	1 095 248*
69 216	Wilmington Trust, Common	903 592	2 837 856**
7 460	News-Journal, Common	846 107	6 800 000***
	Total	$77 669 670	$2 232 943 604

* Based on NYSE closing prices–but this may not be the realizable value of such a large block of stock.

** Based on closing bid price in local OTC market–but this may not be the realizable value of such a large block of stock.

*** Estimated fair market value (estimated at approximate net asset value per books of the News-Journal at 12/31/71).

Wilmington Trust Company stock owned by Christiana represents 3.45% of the outstanding shares of such stock. The News-Journal Company is 100% owned by Christiana.

The following calculation indicates the net asset value of Christiana at May 1, 1972, based on carrying value and on market value.

	Net Asset Value Based on	
	Carrying Value	*Market Value*
Security holdings (as above)	$77 669 670	$2 232 943 604
Cash (and cash equivalents), less current liabilities	5 238 875	5 238 875
Federal tax claim (re tax on GM divestiture)	11 723 013	8 910 000*
Net Asset Value	$94 631 558	$2 247 092 479

* Estimated–assuming settlement for refund of taxes of $7,130,000 (tentative amount currently under discussion with Government attorneys), plus interest.

Capitalization of Christiana at May 1, 1972 (per the books) is as follows:

Capital stock oustanding:	
7% cumulative, non-voting preferred–106,500 shares	$10 650 000*
Common ($1.25 par value)–11,710,103 shares	14 637 629
Total	$25 287 629
Earned Surplus	68 503 453**
Total	$93 791 082

* Par value–$100 a share; liquidation value–$100 a share; call price–$120 a share.

** Christiana's accumulated earnings and profits at May 1, 1972 for Federal tax purposes are $96MM.

Du Pont common shares held by Christiana are equivalent to 1.15 shares of Du Pont common for each share of Christiana common outstanding. At December 31, 1971 there were 6,815 holders of Christiana common stock and 1,543 holders of the Christiana preferred stock.

Christiana common stock is traded in the national Over-the-Counter market; the preferred shares are traded in the local OTC market. Trading volume in both issues is quite limited. The principal "market makers" for

Christiana common currently are Laird & Co., Laird, Bissell & Meeds, Merrill Lynch and Troster, Singer & Co.

Over the years, the market price for Christiana common consistently has been lower than the underlying net asset value (market value basis). Typically, this discount from underlying net asset value has been in the range of 15% to 20%. But for the past two years such discount generally has been in the range of 20% to 25%—and was 23% on April 28, 1972 when Du Pont and Christiana announced that a possible merger would be considered.

2. *Possible Advantages and Disadvantages of Merger*

Since the equity of Christiana preferred stockholders in Christiana's net assets is quite small (only about one-half of one percent of *market value* of net assets) and Christiana's assets consist almost entirely of Du Pont common stock, the merger would represent for the Christiana common stockholders essentially an exchange of their Christiana shares for all (or a large portion) of the shares of Du Pont common now held by Christiana. Some possible advantages and disadvantages of a merger for the Christiana common stockholders are—

a. Advantages

(1) Eliminate Federal income tax (at effective rate of 7.2%) on dividends applicable to Du Pont shares now held by Christiana.

(2) Eliminate market price discount (from market value of underlying security holdings) now applicable to interest in Du Pont Company held via Christiana.

(3) Improved marketability of security holdings.

(4) Eliminate Christiana operating expenses.

b. Disadvantages

(1) Loss of any benefit derived from holding some 28% of outstanding Du Pont common shares in a single block.

(2) Loss of equity to extent of any financial gain to Du Pont resulting from the merger terms—except that former Christiana shareholders would recapture a portion thereof by reason of becoming direct stockholders of Du Pont.

(3) Expenses of merger.

Possible advantages and disadvantages of a merger for Du Pont and its common stockholders are—

a. Advantages

(1) Any financial gain to Du Pont resulting from the merger terms (only the Du Pont stockholders other than former Christiana stockholders would realize net advantage from this).

(2) Dispersion into some 7M separate holdings of the large single block of Du Pont common now held by Christiana.

(3) Corporate simplification (e.g., elimination of need to seek exemption order under the "1940 Act" for Du Pont to enter into certain types of commercial transactions).

b. Disadvantages

(1) Expenses of merger.

As an alternative to merger into Du Pont, Christiana and its stockholders have available the means to achieve substantially the same end result (except for tax costs) through liquidation of Christiana and distribution of its

assets to its stockholders (i.e., a so-called "one-month liquidation" under Section 333 of the Internal Revenue Code). Federal tax on such a liquidation would be limited to tax on Christiana's accumulated earnings and profits (as calculated for Federal tax purposes—currently about $96MM), provided holders of a sufficient volume of Christiana shares elected such tax treatment (such election by holders of at least 80% of shares held by corporate stockholders and by holders of at least 80% of shares held by other stockholders would be required). Assuming these election requirements were met, Federal tax to be paid by Christiana stockholders as a result of a "one-month liquidation" of Christiana probably would be in the range of $50MM to $60MM.

3. *Form of Merger*

Merger of Christiana into Du Pont probably should take the form of a statutory merger. Such a merger transaction could be structured so as to be "tax-free" to all parties involved (Du Pont; Christiana; Christiana stockholders). In a statutory merger the Christiana common stockholders would receive shares of Du Pont common in exchange for their Christiana shares, at the rate specified in the agreed upon merger terms, and Christiana would cease to exist as a corporate entity. Possibilities regarding treatment of the Christiana preferred stockholders, and also the handling of News-Journal and Wilmington Trust Co. stocks now held by Christiana, are discussed in some detail in later sections of this memorandum. Certain important aspects of a statutory merger of Christiana into Du Pont are discussed below:

a. Stockholder approval

Under Delaware Corporation Law (and, as to Du Pont, also under rules of the New York Stock Exchange) a statutory merger of Christiana into Du Pont would require prior approval of the stockholders of each of the companies. Du Pont common and preferred stockholders would vote together as a single class, and a majority affirmative vote of the shares outstanding would be required to effect the merger. This same procedure would be applicable to Christiana. It may also be necessary for Du Pont to obtain stockholder approval to increase the authorized number of shares of Du Pont common (now 60MM) to have sufficient shares authorized to effect the merger.

It would be necessary for Du Pont and Christiana to call special meetings of their stockholders for stockholder vote on the merger proposal, unless timing is such that it could be handled conveniently at the regular annual stockholder meetings. Scope of material to be included in the proxy statements for stockholders on the matter would be about the same as required by the SEC for a registration statement in connection with a public offering of stock.

No appraisal rights would be available to any dissenting Du Pont or Christiana stockholders (except Christiana preferred stockholders) under Delaware Corporation Law. However, in certain recent merger transactions the companies involved have voluntarily granted appraisal rights to dissenting stockholders. The possibility of granting voluntary appraisal rights in connection with a merger of Christiana into Du Pont is under study.

b. SEC exemption order

Merger of Christiana into Du Pont would be prohibited by the Investment Company Act of 1940 unless a prior exemption order with respect thereto is obtained from the SEC. In application to the SEC for the exemption order it would be necessary to demonstrate that the terms of the proposed merger are reasonable and fair and do not involve overreaching on the part of any person concerned.

We believe the SEC would grant such an exemption order without holding a public hearing on the matter. But the SEC frequently requires several months to process such an application and grant the requested exemption order. Based on past practice, we expect that the SEC would require that each stockholder of Du Pont and of Christiana be supplied with a copy of the public notice regarding the application for exemption order that would be published in the Federal Register by the SEC.

c. Tax ruling

It should be possible to structure a statutory merger of Christiana into Du Pont in such manner that there could be little question as to its "tax-free" status. But securities with aggregate value of some $2 billion would be involved and it would be prudent to obtain a favorable Federal tax ruling on the proposed transaction before the merger is consummated.

d. Mechanics

When the merger becomes effective, Christiana common stockholders would be requested to surrender their certificates for Christiana common shares in exchange for certificates for an appropriate number of Du Pont common shares. No certificates for fractional shares of Du Pont common would be issued. Instead, each person entitled to a fractional interest in a share of Du Pont common would be given opportunity, through an Order Form Agent appointed for the purpose, to purchase an additional fractional interest to make up a full share, or sell his fractional interest.

Dividends payable on Du Pont common after the effective date of the merger would not be paid with respect to any Du Pont shares represented by Christiana certificates not yet surrendered for exchange. Du Pont would hold funds for such dividends, for payment when the Christiana certificates are surrendered.

As an alternative to a statutory merger, the transaction could take the form of an acquisition by Du Pont of all of the business and net assets of Christiana, using Du Pont common stock for payment; Christiana then would distribute the Du Pont stock to its stockholders and dissolve. A transaction in this form could be structured so as to be "tax-free", but it would be more complex than a statutory merger transaction and from a practical standpoint we do not now know of any benefit to be gained by following such a route.

4. *Christiana Preferred Stock*

In planning for a merger of Christiana into Du Pont appropriate arrangements must be made to give equitable treatment to the Christiana preferred stockholders.

The Christiana preferred stock was issued in 1922, as a stock dividend on the common shares. Because of

the high dividend rate (7%), market price for the preferred shares frequently has been somewhat above the $120 call price, but the price has declined in recent years (reflecting the higher general level of interest rates) and now is about $100 a share.

Preferred stockholders of Christiana are entitled to receive $100 a share if Christiana is liquidated. Under Delaware Corporation Law payment to the preferred stockholders to retire their preferred shares is limited to not more than the call price of $120 a share. Thus, it would seem to be indicated that settlement with the preferred stockholders should be on the basis of some amount in the range of $100 to $120 a share. This should be primarily a matter for Christiana to determine—i.e., Christiana should decide how the total value of Christiana should be distributed as between its preferred stockholders and its common stockholders. Some alternatives that might be available with respect to treatment of the Christiana preferred stockholders are listed below—

a. Call preferred shares for redemption at some time prior to the merger (107M shares at $120 a share would require $13MM in cash for the redemption).

b. Call preferred shares for redemption as of the effective date of the merger (also would require $13MM in cash for the redemption).

c. Arrange merger terms to give the preferred stockholders Du Pont common stock with value equal to some amount in the range of $100 to $120 a share in exchange for their preferred shares.

d. Arrange merger terms to give the preferred stockholders Du Pont common stock as in c. above—or, at the election of a stockholder, an equivalent amount in cash.

Tax impact on the Christiana preferred stockholders of these various methods will require careful study and probably will have important bearing on the ultimate decision as to appropriate treatment of the preferred stockholders.

5. *News-Journal Stock*

The News-Journal Company, wholly-owned by Christiana, publishes the only newspaper in Wilmington. It would not seem desirable, from the standpoint of good public relations, for Du Pont to own the only newspaper in its headquarters city. Accordingly, disposition of this holding by some appropriate means—either before the merger or promptly thereafter—would seem to be indicated. Some possibilities that might be available to Christiana for disposition of the News-Journal holding prior to the merger are discussed briefly below—

a. Sale of News-Journal

Christiana could sell the News-Journal stock to a suitable buyer for cash (or securities readily convertible into cash). Perhaps an independent appraisal to determine the fair value of the stock would be desirable. Proceeds from sale would be subject to tax—at 30% capital gains rate on any amount in excess of Christiana's $846,107 tax basis for the stock.

b. Exchange News-Journal shares for Christiana common

Offer could be made to exchange News-Journal shares for Christiana common shares (similar to earlier exchanges of GM and Hercules shares for Christiana common). Such an offer might reasonably reflect a premium to exchanging stockholders equal to a substantial portion of the tax cost that

would be incurred by Christiana upon sale of the News-Journal shares. Because of timing considerations, the relatively small value of the News-Journal holding, and the many complexities involved in making such an exchange, it is doubtful if this method of disposal would be very attractive for Christiana.

c. Distribute News-Journal shares pro rata to Christiana common stockholders

Christiana could distribute the News-Journal shares pro rata to Christiana common stockholders (1) as a distribution *in addition* to regular cash dividends, or (2) as a distribution *in lieu* of a portion of regular cash dividends (value of the News-Journal probably would be equal to some 10% to 15% of Christiana's annual cash dividend on common). Such a distribution would be taxed to the shareholders as a dividend (tax might amount to some 50% to 60% of the value of the News-Journal). But if the distribution is in lieu of a portion of regular cash dividends it would not increase the amount of taxes the stockholders otherwise would have to pay—and cash equal to the value of the News-Journal would be retained by Christiana and would flow to Du Pont in the merger as part of the assets exchanged for Du Pont common.

Following the distribution the News-Journal would have about 7M stockholders (i.e., those who now are holders of Christiana common). The News-Journal could continue to operate as an independent newspaper enterprise or, in due course, it might—

(1) sell its newspaper business to a suitable buyer, or

(2) enter into a tax-free merger with a reputable publishing company (or other business enterprise).

If Christiana does not dispose of the News-Journal prior to the merger, the News-Journal shares would flow to Du Pont in the merger. An independent appraisal to determine the value of the News-Journal for merger purposes would be indicated. Also, appropriate allowance should be made in the merger terms for tax and other costs that Du Pont might incur in ultimate disposition of the News-Journal. Following the merger Du Pont might sell its News-Journal holding or work out a tax-free merger of the News-Journal into a reputable publishing company (in exchange for stock that could be converted into cash in due course).

6. *Wilmington Trust Stock*

It would also seem desirable that Christiana dispose of its Wilmington Trust stock before the merger if practicable. A program by Christiana to sell this stock through normal market channels over a suitable span of time (or possibly via private placement) should be feasible. Proceeds from sale would be subject to tax—at 30% capital gains rate on any amount in excess of Christiana's $903,592 tax basis for the stock.

If Christiana does not dispose of the Wilmington Trust stock and it flows to Du Pont as a result of the merger, we would see no sound business reason for Du Pont to continue to hold the shares simply as an investment. The Wilmington Trust shares could be contributed to the Du Pont pension fund in lieu of an amount of cash

corresponding to the fair market value of the shares. But this would generate tax to Du Pont at the 30% capital gains rate on the difference between the fair market value of the shares (about $2.8MM) and Christiana's $903,592 tax basis for the shares. Moreover, we believe it would be undesirable for the Du Pont pension fund to hold Wilmington Trust shares. As a matter of policy, we have never invested any part of the pension funds in Du Pont common or General Motors common—to avoid any possible basis for criticism of Du Pont with respect to its fiduciary duty regarding the Fund because of such a holding. We feel that these same considerations are applicable to stock of Wilmington Trust, the trustee of the Fund.

It appears to be indicated that Du Pont should sell any Wilmington Trust shares it receives in the merger fairly promptly after the merger. Appropriate allowance should be made in the merger terms for tax and other costs that Du Pont might incur as a result of the sale.

7. *Tax Claim*

Christiana has filed suit in the U. S. District Court for refund of a substantial amount of Federal income taxes and interest. The suit relates principally to taxes on GM stock received by Christiana as a result of the Du Pont divestiture of its GM holdings in 1962-65. Discussions between Christiana's counsel and Government attorneys have resulted in tentative understanding that a settlement of the suit for refund of taxes of about $7.1MM, plus interest (which interest would be about $1.8MM, net of tax, up to this time), might be possible. Such possible settlement is under consideration in the Justice Department at present; any settlement ultimately agreed upon would require approval of the Joint Committee on Internal Revenue Taxation of the Congress.

It is highly unlikely that this claim could be settled prior to the merger, and this outstanding tax claim probably will be a part of the Christiana assets flowing to Du Pont as a result of the merger. Careful analysis will be required to establish a fair and reasonable value for the tax claim for purposes of the merger.

8. *Financial Experts*

Since a number of the Du Pont directors own Christiana common stock and five of the Du Pont directors also are directors of Christiana, it is important that extraordinary effort be made to assure that the merger terms are fair and reasonable for all parties affected. It is contemplated that advice of independent financial experts will be obtained for guidance in negotiating acceptable merger terms. A plan now under consideration for obtaining suitable advice of independent financial experts is as follows—

1. Morgan Stanley & Co.—an investment banking firm that has had close relationships with both Du Pont and Christiana for many years—would be retained jointly by Du Pont and Christiana to develop recommendations regarding suitable merger terms and submit report thereon to both Du Pont and Christiana.
2. Du Pont and Christiana each would retain a separate independent financial expert of its own choice to submit recommendations to its principal (i.e., Du Pont or Christiana).

9. *Time Schedule*

A precise time schedule for the proposed merger has not yet been developed. Schedule generally along the following lines might be indicated—

May	1. Retain independent financial experts 2. Start work on preparation of various documents that will be required
End of June	Receive reports from independent financial experts
Early July	Negotiate merger terms
Mid-July	1. Du Pont & Christiana Boards meet to— (a) approve merger terms (b) call special meetings of stockholders 2. File application for SEC exemption order 3. File request for tax ruling
End of August	Mail proxy material
End of September	1. Special stockholders meetings (Du Pont and Christiana) 2. Closing (timing of closing could be delayed if SEC exemption order or tax ruling have not been received).

Treasury Division

MURTAUGH EXHIBIT NO. 5

(Exclusive of exhibits)

July 10, 1972

To: Executive Committee

From: Special Committee of the Board of Directors

Merger of Christiana Into Du Pont

Special committees of the Boards of Directors of Christiana Securities Company (Edward B. du Pont; A. Felix du Pont, Jr.) and the Du Pont Company (C. B. McCoy; I. S. Shapiro) were appointed earlier this year to consider a possible merger of Christiana into Du Pont. The special committees have considered advantages and disadvantages of such a merger and have concluded that there are mutual benefits to Christiana and Du Pont and the stockholders of both companies to be gained from a merger. Independent financial advisors were engaged to provide guidance regarding appropriate merger terms. A proposed plan of merger, negotiated by the special committees, is presented herein—and the Du Pont special committe recommends approval thereof by the Du Pont Company.

A merger pursuant to the proposed plan would benefit Christiana common stockholders through increase in market value of securities they own (i.e., those representing an interest, indirectly or directly, in the Du Pont Company) and improved marketability of such securities; also, the intercorporate tax on Du Pont dividends now flowing to them via Christiana would be eliminated. Du Pont and its common stockholders would benefit from the effect of the discount ($57.7MM—$1.22 per Du Pont common

share) of Christiana's net asset value reflected in the merger terms. Collateral advantages to Du Pont would be (1) dispersion to some 8M Christiana stockholders of the large block of Du Pont common now held by Christiana, and (2) some corporate simplification (e.g., elimination of administrative inconvenience involved in complying with the Investment Company Act of 1940). Comprehensive discussion of the proposed plan of merger and the effects thereof on Christiana and Du Pont and the stockholders of both companies follows.

1. *Background*

Christiana (a Delaware corporation) is a closed-end, non-diversified management investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940. Data regarding capitalization and stockholders of Christiana at May 31, 1972 are shown in the following tabulation:

Capital stock outstanding:	
7% cumulative, nonvoting preferred, $100 par value—106,500 shares	$10 650 000
Common, $1.25 par value—11,710,103 shares	14 637 629
Total	25 287 629
Earned surplus	68 503 453
Total capitalization	$93 791 082
Number of stockholders:	
Preferred	1 543
Common	6 815

The Christiana preferred stock is callable at $120 a share and is entitled to $100 a share in event of liquidation.

Security holdings of Christiana and book and market values thereof at May 31, 1972 are shown below:

No. of Shares	*Security*	*Value at May 31, 1972*	
		Book Value	*Market Value*
13 417 120	Du Pont, Common	$74 621 915	$2 284 264 680*
16 256	Du Pont, $4.50 Pfd.	1 298 056	1 123 696*
69 216	Wilmington Trust Co., Common	903 592	2 820 552**
7 460	News-Journal Co., Common	846 107	24 250 000***
	Total	$77 669 670	$2 312 458 928

* Based on closing price on the New York Stock Exchange.
** Based on closing bid price in the local over-the-counter market.
*** Indicated fair market value (including $1,250M for net quick assets), based on appraisal by Mr. Vincent J. Manno, an expert in the newspaper field.

Du Pont stock held by Christiana represents 28.28% of the outstanding Du Pont common shares (equivalent to 1.15 shares per share of Christiana common) and .96% of the outstanding Du Pont $4.50 preferred shares. Wilmington Trust Co. stock held by Christiana represents 3.45% of the outstanding shares. The News-Journal Co. is wholly-owned by Christiana.

In addition to the security holdings listed above, Christiana has other assets consisting of (1) cash and cash equivalents, less current liabilities, in the net amount of $5,238,875 (at 5/1/72), and (2) a claim for refund of Federal income taxes and interest, carried on the books as a deferred charge in the amount of $11,723,013. The claim for tax refund, amounting to approximately $21 million, principally involves a controversy as to the fair market value for Federal income tax purposes of the very large blocks of General Motors common stock received by Christiana in 1962, 1964 and 1965 as a result of the General Motors divestiture distribution by Du Pont.

Market value of the large block of Du Pont common shares held by Christiana represents some 98% to 99% of

the current market value of Christiana's total assets and virtually all of Christiana's gross income consists of dividends paid on these Du Pont common shares. Christiana has consistently followed the practice of declaring dividends on its common stock in an amount nearly equal to its net earnings per share of common stock. Thus, a holding of Christiana common stock represents essentially a holding, indirectly, of Du Pont common stock.

The common stockholders of Christiana could realize certain advantages by holding their interest in Du Pont directly, in the form of Du Pont common stock, rather than indirectly via ownership of Christiana common stock, as follows:

a. *Market value of the securities held would tend to reflect their full intrinsic value*—Christiana common stock has traditionally traded at a discount compared to the market value, at then current prices, of the net assets underlying the Christiana common stock. Over the past two years this discount generally has been in the range of 20% to 25%—and was 23% on April 28, 1972, when it was announced publicly that a possible merger would be considered. With the Christiana interest in Du Pont held directly by Christiana stockholders via ownership of Du Pont common, this discount would be eliminated.

b. *Securities held would be more readily marketable*—Christiana common stock is traded in limited volume in the over-the-counter market. Du Pont common stock has a broad quoted market on the New York Stock Exchange and more limited markets on other exchanges. In the first five months of 1972 weekly trading volume averaged approximately 92,000 shares for Du Pont common and only about 2,600 shares for Christiana common.

c. *Income would be increased*—Dividends paid by Du Pont to Christiana must be reduced by the Federal intercorporate dividend tax (currently at an effective rate of 7.2%) and other (relatively minor) operating expenses of Christiana before they can be passed on by Christiana to the Christiana stockholders.

From time to time Christiana and Du Pont have considered the desirability and feasibility of merger. Christiana initiated the current merger discussions, stating the belief that (1) benefits from realizing the foregoing advantages may now outweigh the benefits derived from the holding of a large block of Du Pont stock by Christiana, and (2) a merger might be practicable on terms that would be favorable to both Christiana and Du Pont and the stockholders of both companies.

Christiana's proposal to consider a merger is of interest to Du Pont principally because it presents a possible opportunity for Du Pont to acquire the substantial block of Du Pont common now held by Christiana at some discount from current market price, in exchange for new Du Pont common shares valued at current market price. The financial benefit to Du Pont from an exchange on such a basis would not result in corresponding loss of equity to Christiana stockholders—because they would recapture some 28% thereof by reason of becoming direct common stockholders of Du Pont. The merger also would provide advantage to Du Pont from (1) dispersion into some 8M separate holdings of the large single block of Du Pont common now held by Christiana, and (2) some corporate simplification (e.g., Du Pont no longer would be required

to obtain prior exemption orders under the Investment Company Act of 1940 before undertaking certain types of commercial transactions).

2. *General Merger Plan*

The proposed plan of merger contemplates that the transaction will take the form of a statutory merger—the form most desirable from the standpoint of obtaining a Federal ruling that the transaction will be "tax-free". On the effective date of the merger both classes of Christiana stock—preferred and common—will be converted into Du Pont common stock at the rates specified in the agreed upon merger terms, and Christiana's corporate existence will then cease. The merger agreement will provide (as discussed hereinafter) that the holders of Christiana common on the effective date of the merger are contingently entitled to additional shares of Du Pont common stock upon ultimate settlement of the pending Christiana claim for tax refund.

The shares of Du Pont common used for the merger will be newly issued shares. The shares of Du Pont common and Du Pont $4.50 Preferred received from Christiana in the merger will be retired.

Christiana stockholders will be requested to surrender their certificates for Christiana stock in exchange for certificates for an appropriate number of Du Pont common shares. Dividends payable on Du Pont common after the effective date of the merger will not be paid with respect to any Du Pont shares represented by Christiana certificates not yet surrendered for exchange. Du Pont will hold funds for such dividends, for payment when the Christiana certificates are surrendered.

No fractional shares of Du Pont common will be issued to the Christiana stockholders. Instead, Christiana

stockholders having a fractional interest in a share of Du Pont common will be provided an opportunity, through an Agent appointed for such purpose, to 1) sell such interest or 2) purchase the additional fractional interest required to make up one full share.

Certain important procedural matters with respect to the proposed merger are discussed below.

a. Stockholder approval

Under Delaware Corporation Law (and, as to Du Pont, also under rules of the New York Stock Exchange) a statutory merger of Christiana into Du Pont requires prior approval of the stockholders of each of the companies. Du Pont common and preferred stockholders would vote together as a single class, and a majority affirmative vote of the shares outstanding would be required to effect the merger. This same procedure would be applicable to Christiana. It will also be necessary for Du Pont to obtain stockholder approval to increase the authorized number of shares of Du Pont common (now 60MM) to have sufficient shares authorized to effect the merger. Special meetings of Christiana and Du Pont stockholders for such purpose later this year (probably in November or December) are contemplated. Scope of material to be included in the proxy statements for stockholders on the matter will be about the same as required by the SEC for a registration statement in connection with a public offering of stock.

b. SEC exemption order

Merger of Christiana into Du Pont is prohibited by the Investment Company Act of 1940, unless a prior exemption order with respect thereto is ob-

tained from the SEC. In application to the SEC for the exemption order it will be necessary to demonstrate that the terms of the proposed merger are reasonable and fair and do not involve overreaching on the part of any person concerned.

We believe the SEC will grant an exemption order. But the SEC frequently requires several months to process such an application and grant the requested exemption order. The main steps involved are—

(1) Christiana and Du Pont file joint application for an exemption order, giving therein a comprehensive description of the proposed transaction and its effects on the parties involved.

(2) After study and determination that the proposal appears fair to all concerned, the SEC publishes a Notice in the Federal Register describing the proposed transaction and giving a specified period (perhaps 20 to 30 days) for interested parties to request a formal hearing on the matter. We expect the SEC to require that a copy of this Notice be sent to each Christiana and Du Pont stockholder.

(3) When the specified period for requesting a hearing ends, the SEC will determine whether there should be a formal hearing, an informal hearing or no hearing on the matter. The SEC could require a hearing even if none is requested, or deny a hearing even if one is requested.

(4) When any required hearing is completed and the SEC is fully satisfied as to the fairness of the proposed transaction, it will issue the requested exemption order.

c. Tax ruling

It might be possible to structure a statutory merger of Christiana into Du Pont in such manner that there would be little question as to its "tax-free" status. But securities with aggregate value of some $2 billion are involved and it is prudent to obtain a favorable Federal tax ruling on the proposed transaction before the merger is consummated. A period of some 3 to 4 months might be required to obtain such a ruling.

3. *Treatment of Tax Claim*

Christiana has filed suit in the U. S. District Court for refund of a substantial amount (some $21MM) of Federal income taxes and interest. The suit relates principally to taxes on GM stock received by Christiana as a result of the Du Pont divestiture of its GM holdings in 1962-65. Discussions between Christiana's counsel and Government attorneys have resulted in tentative understanding that a settlement of the suit for refund of taxes of about $7.1MM, plus interest (which interest would be about $1.8MM, net of tax, up to this time), might be possible. Such possible settlement is under consideration in the Justice Department at present; any settlement ultimately agreed upon would require approval of the Joint Committee on Internal Revenue Taxation of the Congress. Counsel are uncertain as to whether some settlement might ultimately be achieved or the suit will have to come to trial in the District Court.

Christiana and Du Pont and the financial advisors know of no reasonable method to determine at this time the fair value of Christiana's tax claim, because there is no

way of predicting the amount, if any, that will ultimately be recovered with respect thereto. Therefore, the merger terms contemplate that the tax claim, together with $1 million of Christiana's cash to be reserved to cover expenses to pursue the claim, will be treated at the time of merger as having no value. The tax claim and related cash reserved for expenses will become the property of Du Pont on the effective date of the merger, but a Tax Claim Committee, consisting of the present directors of Christiana and successors thereof elected by a majority of the whole Tax Claim Committee to fill any vacancies, will be established to manage, with assistance of counsel and on behalf of the former Christiana common stockholders, matters pertaining to pursuit of the tax claim. Du Pont will not participate in decisions regarding litigation or other developments with respect to the tax claim. The Tax Claim Committee will have complete responsibility for all such decisions and full authority to dispose of the tax claim in any manner that it deems to be in the best interests of the former Christiana common stockholders.

Du Pont will use the funds reserved for expenses for payment of expenses incurred by the Tax Claim Committee. Upon settlement of the tax claim, any residue of such funds, together with funds equivalent to net proceeds from settlement of the tax claim, will be converted into Du Pont common stock having corresponding value and such shares will be delivered to an Agent appointed for the purpose. The Agent will distribute these additional shares of Du Pont common pro rata to the former Christiana common stockholders in proportion to the Du Pont common stock received by them in the merger transaction. The price for Du Pont common stock to be used for the foregoing conversion will be the average of the closing prices for Du Pont common on the New York Stock Exchange for the ten

trading days preceding the date on which refund payment by the Government is received by Du Pont or, if no refund is to be received, the date on which final judgment to that effect becomes final.

In order to maintain the tax-free status of the merger, any additional Du Pont shares must be delivered within five years from the effective date of the merger. If the tax claim is not settled within that period, Du Pont will negotiate in good faith with the Tax Claim Committee during the final 45 days of the five-year period to determine the then fair value of the claim. If agreement as to such fair value is reached, a distribution of additional Du Pont shares based thereon will be made at that time. If Du Pont and the Tax Claim Committee are unable to agree at that time on fair value of the claim, the additional distribution will be deferred until ultimate settlement of the claim, and then be made in cash.

4. *Treatment of Miscellaneous Stocks*

Du Pont will receive from Christiana in the merger 69,216 shares of Wilmington Trust Company common stock with current market value of $2.8MM and all outstanding shares of the News-Journal Company with an appraised fair value of $24.3MM. Du Pont would prefer that Christiana dispose of these holdings before the merger, but Christiana is not in position to do so on an orderly basis.

Wilmington Trust is the trustee for the Du Pont pension fund and the Du Pont thrift plan and, in any event, there is no logical basis for Du Pont maintaining an investment in bank stock. The News-Journal Co. publishes the only daily newspapers in Wilmington, Du Pont's headquarters city. Therefore, it is intended that Du Pont will hold these two investments for only the period required for orderly disposition thereof. The proposed merger

terms reflect suitable allowance for expenses that might be incurred in connection with sale of these inves' nents and for tax on gain (excess of sale proceeds over Christiana's tax basis for the securities) resulting from such sale.

Christiana and Du Pont jointly engaged Mr. Vincent J. Manno, an expert in the newspaper field, to make an independent appraisal and evaluation of the fair market value of the outstanding common stock of the News-Journal Co. Mr. Manno concluded that such fair market value is $23MM, plus net quick assets (about $1,250,000). This appraised value seems quite high, judging according to any normal standards. For example, the appraised value is nearly 50 times annual News-Journal Co. net income of about $500M in recent years. Typically, price-earnings ratios for publicly traded newspaper stocks are mainly in the range of 20 to 25. Mr. Manno feels that News-Journal earnings are well below a reasonable potential level and that those interested in buying newspapers will recognize the News-Journal earnings potential and be prepared to accept a purchase price reflecting such potential.

Du Pont will have risk of possible loss upon sale of the News-Journal Co., considering that (1) despite Mr. Manno's views on the matter, potential buyers may not be willing to meet a sale price reflecting full earnings potential, and (2) Du Pont will have need to be selective, in the light of its overall community interests, to assure sale to a fully responsible buyer. This possible risk of loss has been taken into account in negotiating the proposed merger terms.

5. *Treatment of Merger Expenses*

Both Christiana and Du Pont will incur certain expenses in connection with the merger transaction, estimated as follows:

Professional fees (legal, financial advisors, etc.)	$1 150 000
Printing, mailing, etc.	350 000
Total	$1 500 000

About 40% of these estimated expenses will be incurred by Christiana, and the remaining 60% by Du Pont. The special Board committees have agreed that it would be equitable for Christiana and Du Pont to share the total estimated merger expenses equally. Du Pont will make payment for all of the merger expenses, and will recover 50% of the estimated merger expenses from Christiana via deduction in computing Christiana's adjusted net asset value for purposes of the merger.

6. *Basis for Merger Terms*

Five of the Du Pont directors also are directors of Christiana, and seven additional Du Pont directors own shares of Christiana common stock. Christiana is a major stockholder of Du Pont. Benefits to Christiana from the merger will be quite visible and substantial. Christiana appears to have no reasonable alternative means available to achieve approximately the same benefits it will realize from the merger. The merger terms must be structured so that they provide Du Pont sound business reasons to undertake the merger and a basis for presenting to Du Pont stockholders (including some 60M Du Pont employees who are stockholders) a proposal that the stockholders, generally, will consider attractive and worthy of a favorable vote. The merger terms must be such that they will stand-up under close scrutiny by the SEC to assure fairness to all parties affected by the merger.

Taken together, the foregoing factors have underscored the need for the merger negotiations to be com-

pletely free of any possible conflict of interest and for extraordinary effort to be made to assure that the merger terms are fair and reasonable for all parties involved. In view of these circumstances, independent financial advisors, none of which has any affiliation with either Christiana or Du Pont, were engaged to provide advice and guidance regarding the terms of the merger, as follows:

a. Morgan Stanley & Co., which firm is familiar with Du Pont and Christiana and has advised both companies on financial matters for a number of years, was engaged jointly by Christiana and Du Pont to advise both companies regarding appropriate merger terms.

b. Kidder, Peabody & Co., Incorporated was engaged by Christiana to advise Christiana separately regarding appropriate merger terms.

c. The First Boston Corporation was engaged by Du Pont to advise Du Pont separately regarding appropriate merger terms.

Reports submitted by the three independent financial advisors with respect to their studies and recommendations accompany this report.

A variety of factors that might be pertinent with respect to merger terms were considered by the independent financial advisors in their studies, as outlined in their reports, and by the special Board committees in the course of negotiations. But attention ultimately centered mainly on—

a. whether Christiana stockholders should receive Du Pont common stock with current market value equal to the current market value of Christiana's underlying net assets, or some lesser (or greater) amount to reflect a discount (or premium) from such net asset value; and

b. the volume of Du Pont common shares that could flow to Christiana stockholders without diluting Du Pont's financial position (earnings per share; dividends per share; etc.)—and, alternatively, the volume that could so flow and result in some modest improvement in Du Pont earnings per share.

The independent financial advisors recommended ranges of basic merger terms that they would consider fair and reasonable. Their recommendations with respect to basic merger terms, expressed in terms of % discount (or premium) from Christiana's adjusted net asset value (i.e., actual underlying net asset value, adjusted to reflect the value of the respective assets to Du Pont), are summarized below:

	Recommended Range of Discount (or Premium)
Morgan Stanley & Co.	½% discount to 2½% discount
Kidder, Peabody & Co., Inc.	2% premium to 3% discount
*The First Boston Corp.	1.1% discount to 3.7% discount

* First Boston recommendation is stated in terms of the primary merger ratio (i.e., the number of Du Pont common shares to be exchanged for each Christiana common share). See Exhibit A for calculation to translate such recommendation to the equivalent in terms of % discount from Christiana adjusted net asset value.

The Du Pont special Board committee considered it necessary that the merger terms reflect discount of Christiana's adjusted net asset value at a rate adequate to provide Du Pont good business reasons for the merger and an attractive proposition to present to Du Pont stockholders for their consideration.

Working from these premises, merger negotiations were undertaken with the Christiana special Board com-

mittee—and agreement was reached that Christiana's adjusted net asset value should be discounted 2½% ($57.7MM) for purposes of the merger. Thus, the proposed merger terms are such as to provide Christiana stockholders shares of Du Pont common stock with current market value equal to 97½% of Christiana's adjusted net asset value in exchange for their Christiana shares. Exhibit B shows detail as of May 31, 1972 of Christiana's net asset value, adjustments thereto to reflect the respective assets at their value to Du Pont, and the adjusted net asset value.

Christiana stockholders will have erosion of their equity interest only to the extent of about 72% of the amount of discount of Christiana's adjusted net asset value reflected in the merger terms—see below:

	Amount	*% of Adjusted Net Asset Value*
Discount reflected in merger terms	$57.7MM	2.5%
Portion recaptured by Christiana stockholders by reason of becoming direct common stockholders of Du Pont	16.1	.7
Net erosion of equity	$41.6MM	1.8%

The 2½% discount rate for the merger transaction compares with a 1½% discount (of Delaware Realty net assets) reflected in the terms of the Christiana-Delaware Realty merger in 1961. In that case there were relatively few public stockholders (of Christiana) involved; in the current transaction more than 200M public stockholders of Du Pont (including some 60M Du Pont employees) will be affected.

The proposed merger terms fall within the range recommended by each of the independent financial advisors and each such advisor has stated the opinion that

the proposed terms are fair and reasonable. Counsel (Covington & Burling) is of the opinion that the proposed merger terms are fair and reasonable and believes that the proposed merger plan will be acceptable to the SEC for purposes of issuing an exemption order with respect thereto. The Du Pont special Board committee considers the proposed merger terms to be fair and reasonable, and appropriate under all of the surrounding circumstances.

7. *Merger Ratios*

The volume of Du Pont common shares available for Christiana stockholders in connection with the merger (13,219M based on May 31, 1972 data) must be divided appropriately between the preferred stockholders and the common stockholders of Christiana.

Each of the independent financial advisors recommended that the Christiana preferred stockholders receive Du Pont common shares with current market value equal to $120 per preferred share (the call price for the preferred—and the maximum that can be given to the preferred stockholders under Christiana's Certificate of Incorporation) in exchange for their preferred shares. Christiana desires that its preferred stockholders be given this favorable treatment, and the proposed merger terms provide for exchange on such basis with the Christiana preferred stockholders. Based on May 31, 1972 data, the Christiana preferred stockholders would receive .7048 share of Du Pont common for each Christiana preferred share.

Under Delaware Corporation Law, any holder of Christiana's preferred stock who does not vote in favor of the merger and who objects in writing within the prescribed time may receive a cash payment equal to the appraised value of his preferred stock—which we would

expect to be the $120 call price. (No such right is available with respect to any Du Pont common or preferred shares or any Christiana common shares.) Christiana stockholders receiving such cash payment would be subject to tax on any gain involved (as would any Christiana stockholder who sells a fractional share interest received in the merger).

Calculation of the merger ratio that would be applicable to the Christiana common stockholders based on May 31, 1972 data is shown below:

Adjusted net asset value of Christiana (see Exhibit B)	$2 308 292M
Less—Discount @ 2½%	57 707
Value of Christina for purposes of the merger	2 250 585
Less—Portion applicable to Christiana preferred (106,500 shares @ $120 a share = 75,066 Du Pont common shares @ $170¼)	12 780
Value of Christiana applicable to Christiana common	$2 237 805M
Number of Du Pont common shares with equivalent value (@ $170¼ a share)	13 144 229
Number of Christiana common shares outstanding	11 710 103
Number of Du Pont common shares into which each Christiana common share will be converted	1.1225

Exhibit C indicates the effects of the proposed merger on per share earnings, etc., of Du Pont common stockholders and on per share earnings and dividends, and market value of security holdings of Christiana common stockholders. The effects on the Christiana preferred stockholders also are indicated.

8. *Implementation*

Data used in this report to illustrate the effects of the proposed merger are based on market prices, etc., as of May 31, 1972, generally consistent with the data used by the independent financial advisors for purpose of their studies. The actual merger terms will be based on data

reflecting average closing market prices for the five trading days immediately preceding the date on which the proposed merger is considered by the respective Boards of Christiana and Du Pont—now scheduled for July 17, 1972. Therefore, the actual merger terms can be expected to differ slightly from those discussed herein. A supplemental memo will be made available at the time of the July 17, 1972 Board meetings to provide information regarding the actual merger terms and pertinent underlying data.

A definitive Agreement and Plan of Reorganization, with an accompanying Agreement of Merger, is being prepared to reflect the plan of merger outlined herein and to be used as the basic legal documents to effect the merger. Such documents will be submitted for approval of the Executive Committee and the Board in the near future, whereupon these documents will be executed by the parties.

It is recommended that the Executive Committee and the Board approve the proposed plan of merger in principle at this time so that (1) public announcement can be made concerning the intent of Christiana and Du Pont to merge and the terms of the merger, and (2) documents can be filed promptly to request a suitable exemption order from the SEC and a tax ruling from the Internal Revenue Service. The requested exemption order and tax ruling are not likely to be received until fairly late this year (perhaps in October or November) and Christiana and Du Pont stockholder meetings to consider the proposed merger probably will not occur until December—following which the merger can be made effective. Proposal for call of a special meeting of Du Pont stockholders and proxy statement for use in connection with such meeting will be submitted for approval at the appropriate time.

The resolutions in Exhibit D are proposed for adoption by the Board of Directors to approve in principle the proposed plan of merger.

The following resolution is proposed for adoption by the Executive Committee to recommend to the Board the approval in principle of the proposed plan of merger.

RESOLVED, that the Executive Committee hereby recommends to the Board of Directors that it approve in principle the proposed plan of merger of Christiana Securities Company into Du Pont, described in report of July 10, 1972 from the Special Committee of the Board of Directors, by adoption of the resolutions set forth in Exhibit D of the report.

C. B. MCCOY

I. S. SHAPIRO

MURTAUGH EXHIBIT NO. 8

Covington & Burling Memorandum

June 6, 1972

SEC AND JUDICIAL PRECEDENTS RESPECTING THE PROPOSED DU PONT-CHRISTIANA MERGER

We have reviewed and summarized in Attachment A hereto certain Securities and Exchange Commission decisions and judicial precedents which we believe to be pertinent to the proposed du Pont-Christiana merger.

The first item is a summary of relevant SEC decisions under Section 17(b) of the Investment Company Act of 1940, respecting a merger or other reorganization involving a closed-end company substantially all (at least 80 percent) of whose assets consisted of stock of the merger partner. The decisions indicate a relatively narrow range of valuation approaches, ranging from a share-for-share distribution (*Detroit and Cleveland Navig. Co.*) to a 1.5 percent discount attributable to elimination of a tier of corporate income taxation and an inducement to the merger partner's shareholders (*Delaware Realty*).

In addition, we have included summaries of SEC opinions in analogous situations involving a merger where at least one party was a registered closed-end investment company, and one of the two parties to the merger owned a substantial stock interest in the other. These cases involve a number of different situations, and embrace quite varied valuation approaches.

Our review covered all published opinions of the SEC through 1964, the last date on which published opinions are available, and all SEC opinions subsequent to that date as prepared and maintained at the Commission's Washington headquarters. In addition, we reviewed In-

vestment Company Act releases for the last ten years. This review disclosed a number of comparable transactions summarized in published notices of applications. In these cases, no Commission opinion was rendered, but a Commission order was issued approving the transaction, often on delegated authority to the Division of Corporate Regulation. While such cases may be considered as precedents, they do not involve any explanation of the result reached. Hence, we consider them of lesser authority than the full Commission opinions. Decisions of this type are noted in the attachment.

Relevant judicial precedent is sparse. We found only two cases, both involving settlement of litigation instituted by shareholders of a holding company seeking its dissolution. The first involved the reorganization of U. S. Foil and its subsidiary, Reynolds Metals, in 1961. The second and unreported case involved a reorganization subsequently approved by the SEC (*Harbor Plywood*).

Finally, there is included a summary of the Delaware Supreme Court case setting forth the standards to be applied in appraisal proceedings of a closed-end investment company. In at least one case (*Atlas Corporation*) the SEC has considered the statutory appraisal remedy as a relevant factor in determining the fairness of the merger terms.

Covington & Burling

MURTAUGH EXHIBIT NO. 9

Excerpts From Final Judgment, Dated March 1, 1962, as Amended April 26, 1962, in General Motors Divestiture Case.

11

each General Motors annual or special meeting, or other occasion on which General Motors stockholders are entitled to vote, copies of which report shall be made available to the parties hereto. Du Pont, Christiana and General Motors are required to cooperate with the Monitor in the execution of his duties. No information obtained by the Monitor in the execution of his duties hereunder shall be disclosed except to the extent necessary in the preparation and submission of the reports to the Court provided for above and upon written request of the Attorney General of the United States or his authorized representative. The Monitor shall provide all parties hereto with copies of all information submitted in response to such requests. No information obtained by means provided in this Paragraph F shall be divulged by any party, or by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Judgment or as otherwise required by law.

VIII

A. Du Pont shall divest itself of all of the General Motors stock specified and itemized in Paragraph B of this Article VIII by distributing such stock to its stockholders (including non *pro rata* distributions in redemption of its own stock), or, in the alternative, by disposing of all such stock by such methods or combination of methods as it may select, such divestiture to commence within ninety (90)

days from the effective date of this Judgment and to be completed not later than thirty-four (34) months from the date on which

12

this Judgment becomes final (appeal time having run or appeal having been completed).

B. The General Motors shares which shall be divested by du Pont pursuant to Paragraph A of this Article VIII are:

(1) The 63,000,000 shares of General Motors stock now owned by du Pont.

(2) Any additional shares of General Motors stock which du Pont may acquire as provided in Article III of this Judgment in respect of the 63,000,000 shares specified in Paragraph B(1) of this Article VIII.

C. The Court makes the following findings with respect to the application of the provisions of Public Law 87-403, enacted February 2, 1962, to this Judgment:

(1) The divestiture by du Pont of all of the General Motors stock which it now has, and which it may acquire as provided in this Judgment, in the manner described in Paragraph A of this Article VIII is necessary and appropriate to effectuate the policies of the Clayton Act.

(2) The application of Section 1111(a) of the Internal Revenue Code of 1954, as amended, is required in order to reach an equitable antitrust order in this proceeding.

(3) The time for the complete divestiture fixed in this order is the shortest period within which such divestiture can be executed with due regard to the circumstances of this particular case.

13

D. In effecting the divestiture required by this Article VIII du Pont shall notify the Assistant Attorney General in charge of the Antitrust Division seven (7) business days in advance of any disposition (except a disposition made by sales on any registered stock exchange or by public offering), or, in the case of any proposed disposition by exchange seven (7) business days in advance of the making of the exchange offer. Such notice shall include, to the extent then known by du Pont, the terms and conditions of the disposition, and the identity of the prospective purchaser or transferee, provided, however, that in the case of disposition by distributions or the making of exchange offers to stockholders, a notice shall be sufficient which includes, to the extent then known by du Pont, the terms and conditions of the distribution or exchange offer and the identity of the class or category of stockholders to whom the distribution or exchange offer is to be made. In the event that the Assistant Attorney General in charge of the Antitrust Division interposes an objection, such disposition or exchange offer shall not be made until it has been first approved by the Court. No information as to any proposed disposition or exchange offer supplied to the Assistant Attorney General in charge of the Antitrust Division pursuant to this Paragraph D shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in connection with proceedings in which the United States is a party in which objection is made to such proposed disposition or exchange offer, or as otherwise required by law.

E. Du Pont shall, within thirty (30) days after each anniversary date of the effective date of this Judgment,

until it shall have divested itself of all General Motors stock as required by this Article VIII, and within thirty (30) days after the completion of the required divestiture, file with the Clerk of the Court and serve upon the Assistant Attorney General in charge of the Antitrust Division a report showing the number of shares of General Motors stock divested during the period reported and the means of divestiture employed.

IX

A. Christiana shall, within three years from the date on which this Judgment becomes final (appeal time having run or appeal having been completed), divest itself of all the General Motors stock specified and itemized in Paragraph B of this Article IX in the following manner:

(1) Christiana may sell such number of shares of General Motors stock as, in the judgment of its Board of Directors, is necessary to provide net proceeds sufficient to pay the taxes imposed upon the receipt by it of General Motors stock from du Pont and any expenses and taxes incurred upon the sale of the shares to be sold.

(2) Christiana shall distribute to its shareholders (including non *pro rata* distribution in redemption of its own stock) the remaining shares of General Motors stock required to be divested by it.

B. The General Motors shares which shall be divested by Christiana pursuant to Paragraph A of this Article IX are:

(1) The 535,500 shares of General Motors stock now owned by Christiana;

(2) Any shares of General Motors stock received by Christiana from du Pont pursuant to Paragraph A of Article VIII of this Judgment;

(3) Any additional shares of General Motors stock which Christiana may acquire in respect of the General Motors shares specified in Paragraphs B(1) and B(2) of this Article IX as provided in Article III of this Judgment.

C. Each person listed in Appendix A or Appendix C to this Judgment, having signed and filed with the Court a Submission to Jurisdiction substantially in the form of Appendix B to this Judgment, and each other person signing and filing with the Court a Submission to Jurisdiction with respect to a transfer of du Pont, Christiana or General Motors stock by a person listed in Appendix A or Appendix C, is hereby ordered and directed to take the actions specified in, and otherwise to comply with the orders and directions of this Court contained in, such Submission to Jurisdiction.

D. The Court makes the following findings with respect to the application of the provisions of Public Law 87-403, enacted February 2, 1962, to this Judgment:

(1) The divestiture by Christiana of all of the General Motors stock which it now has, or which it may acquire as provided in this Judgment, in the manner described in this Judgment is necessary and appropriate to effectuate the policies of the Clayton Act.

(2) The application of Section 1111(a) of the Internal Revenue Code of 1954, as amended, is required in order to reach an equitable antitrust order in this proceeding.

(3) The time for the complete divestiture fixed in this order is the shortest period within which such divestiture can be executed with due regard to the circumstances of this particular case.

E. In effecting the divestiture required by this Article IX, Christiana shall notify the Assistant Attorney General in charge of the Antitrust Division seven (7) business days in advance of any disposition (except a disposition made by sales on any registered stock exchange or by public offering), or, in the case of any proposed disposition by exchange seven (7) business days in advance of the making of the exchange offer. Such notice shall include, to the extent then known by Christiana, the terms and conditions of the disposition, and the identity of the prospective purchaser or transferee, provided, however, that in the case of disposition by distributions or the making of exchange offers to stockholders, a notice shall be sufficient which includes, to the extent then known by Christiana, the terms and conditions of the distribution or exchange offer and the identity of the class or category of stockholders to whom the distribution or exchange offer is to be made. In the event that the Assistant Attorney General in charge of the Antitrust Division interposes an objection, such disposition or exchange offer shall not be made until it has been first approved by the Court. No information as to any proposed disposition or exchange offer supplied to the Assistant Attorney General in charge of the Antitrust Division pursuant to this Paragraph E shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in connection with proceedings in which the United States is a party in which objection is made to such proposed

disposition or exchange offer, or as otherwise required by law.

F. Christiana shall within thirty (30) days after each anniversary date of the effective date of this Judgment, until it shall have divested itself of all General Motors stock as required by this Article IX, and within thirty (30) days after the completion of the required divestiture, file with the Clerk of the Court and serve upon the Assistant Attorney General in charge of the Antitrust Division a report showing the number of shares of General Motors stock divested during the period reported and the means of divestiture employed.

X

A. For the purpose of securing compliance with this Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall be permitted, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice as to time and subject matter to du Pont or Christiana at their respective principal offices

(1) to inspect during office hours all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of du Pont or Christiana relating to any provisions of this Judgment, during which time counsel for du Pont or Christiana, as the case may be, may be present; and

(2) subject to the reasonable convenience of du Pont or Christiana, and without restraint or interference from them, to interview regarding any such provisions any officer or employee of du Pont

MURTAUGH EXHIBIT NO. 15

DRAFT
12/15/72

AGREEMENT

THIS AGREEMENT, dated , 1972, by and between E. I. du Pont de Nemours and Company ("Du Pont"), a Delaware corporation, and the undersigned Stockholder of Christiana Securities Company ("Christiana"),

WITNESSETH:

WHEREAS,

A. Stockholder holds of record or through a nominee, for Stockholder's benefit or in separate trust, agency, custodian and other accounts for the benefit of others, or as pledgee the number of shares of Christiana Common Stock and the number of shares, if any, of Christiana 7% Cumulative Preferred Stock set forth in the Addendum to this Agreement;

B. Such shares of Christiana stock will be converted to shares of $5.00 par value Common Stock of Du Pont ("Du Pont Common Stock") pursuant to an Agreement and Plan of Reorganization between Du Pont and Christiana, including an Agreement of Merger which is an exhibit thereto ("Reorganization Agreement");

C. The Federal securities laws and the rules and regulations thereunder restrict the sale or other disposition of the Du Pont Common Stock to be received pursuant to the Reorganization Agreement by persons who actually or potentially control, are controlled by, or are under common control with Christiana;

D. Stockholder and Du Pont agree that it is impractical to determine with legal certainty whether Stockholder actually or potentially controls, is controlled by, or is under common control with Christiana within the meaning of the Securities Act of 1933, as amended, and the rules and regulations thereunder ("Act"), and therefore, in order to avoid any question concerning a violation of the Act, Du Pont intends to treat Stockholder as though he is restricted by the Act with respect to the sale or other disposition of the Du Pont Common Stock to be received by Stockholder pursuant to the Reorganization Agreement including any shares received upon the occurrence of the contingency specified therein ("Covered Shares"); and

E. Suitable safeguards under the Act require that certificates for the Covered Shares bear a restrictive legend, except that, to facilitate sales in "brokers' transactions" as permitted by Rule 133 under the Act, certificates for the number of shares specified in the Addendum, initially not in excess of 50,000, shall not bear such a legend, and provision shall be made for exchange of legended certificates for unlegended certificates from time to time in the future;

NOW, THEREFORE, Du Pont and Stockholder agree as follows:

1. *No Sales in Violation of Law.*

(a) Stockholder will abide by all restrictions on sale or other disposition of the Covered Shares which may be imposed by the Act. Du Pont and Stockholder understand that, in order to comply with the Act and thus avoid liability thereunder to Du Pont and Stockholder in connection with sale or other disposition of the Covered Shares, during the term of this Agreement such sales or other dispositions should be made only as follows:

(1) In "brokers' transactions" as permitted by Rule 133 under the Act;

(2) Pursuant to a registration statement under the Act; or

(3) In such other manner as is not in violation of the Act, it being understood that Du Pont will not transfer record ownership of shares represented by a certificate bearing the legend provided for in Paragraph 6 that are so sold or otherwise disposed of except upon receipt of an opinion of counsel for Du Pont, or an opinion of counsel for Stockholder, or a "no-action" letter from the staff of the Securities and Exchange Commission ("SEC") and related application, satisfactory in form and substance to Du Pont, to the effect that registration under the Act for such sale or other disposition is not required.

(b) In effecting sales of Covered Shares in such "brokers' transactions" Stockholder shall, to be in compliance with the Act as presently in effect:

(1) Notify his broker that the securities involved are subject to Rule 133 under the Act;

(2) Refrain from directly or indirectly soliciting or arranging for the solicitation of orders to buy in anticipation of or in connection with such transactions;

(3) Make no payment in connection with the execution of such transactions to any persons other than the broker;

(4) Limit each such transaction to a sale or series of sales of Covered Shares which, together with all other sales of Du Pont Common Stock

by Stockholder or on his behalf within the six months preceding such transaction, will not amount to more than the largest aggregate reported volume of trading in Du Pont Common Stock on securities exchanges during any one week within the four calendar weeks preceding the receipt by the broker of the order to execute such transaction.

Sales by any of the following will be deemed to be sales on behalf of Stockholder: (i) any relative or spouse of Stockholder, or relative of such spouse, any one of whom has the same home as Stockholder, (ii) any trust or estate in which Stockholder or any of the persons specified in clause (i) of this sentence collectively own ten percent or more of the total beneficial interest or of which any of such persons serve as trustee, executor or in any similar capacity, (iii) any corporation or other organization other than Du Pont in which Stockholder or any of the persons specified in clause (i) of this sentence are the beneficial owners collectively of ten percent or more of any class of equity securities or ten percent or more of the equity interest, (iv) any donee or pledgee of Covered Shares and (v) any other person or entity with whom Stockholder agrees to act in concert for the purpose of selling such shares, except that Stockholder may use another method of determining sales on behalf of Stockholder in a particular case after having obtained Du Pont's written consent to use such method.

(c) Notwithstanding the foregoing provisions, Stockholder shall be entitled to make sales or other dispositions of Covered Shares in "brokers' transactions" as permitted by Rule 144 under the Act after having obtained Du Pont's written permission to do so, which written permission shall be given only upon demonstration to Du Pont's satisfaction that Stockholder is eligible to make such

sales or other dispositions under Rule 144 and upon execution of a written agreement between Du Pont and Stockholder specifying the procedures to be followed by Stockholder in effecting such sales or other dispositions under Rule 144.

2. *Registration of Covered Shares.*

(a) Du Pont will file with the SEC and use its best efforts to cause to become effective registration statements with respect to sale under the Act of Covered Shares to the extent and in the manner specified in Paragraphs 3 and 4.

(b) No registration statement shall, however, be required to be filed pursuant to this Agreement with respect to any shares of Du Pont Common Stock which, in the opinion of counsel for Du Pont, or as expressed in a "no-action" letter from the staff of the SEC which, together with related application, is satisfactory in form and substance to Du Pont, may be sold without registration under the Act, and in such event the procedures of Paragraph 6(c) shall apply.

(c) Stockholder will furnish Du Pont with such information as Du Pont may reasonably request to enable Du Pont to file any registration statement which Du Pont is required to file pursuant to this Agreement.

3. *Registration Statements.*

(a) Upon Stockholder's request in writing received by Du Pont during Du Pont's normal business hours on March 16 through 20, inclusive, or September 16 through 20, inclusive, of any year, Du Pont will file and use its best efforts to cause to become effective as promptly as practicable a registration statement covering the sale of

such number of Covered Shares as is specified in the request ("Registration Statement"), provided that Du Pont shall not be required to file a Registration Statement under this Paragraph 3 for a firm commitment underwritten offering of Covered Shares. Such request shall be effective only for sales proposed to be made during the calendar month immediately following the date of such request. Any writing received by Du Pont which purports to be a notice satisfying the terms of this Paragraph 3 but which is not received by Du Pont during such time periods shall be void and without effect under this Agreement. Stockholder shall not be entitled to require that a Registration Statement cover only the sale of his shares.

(b) Notwithstanding the limitations of Paragraph 3(a), it is Du Pont policy to be cooperative with its stockholders and, consistent therewith, Du Pont will consider filing at times in a year other than those specified in Paragraph 3(a) a Registration Statement requested by Stockholder for sale of his shares, provided that Du Pont after reasonable inquiry and in its sole discretion is satisfied that registration under the Act (1) is necessary for sale of such shares, and (2) can be effected at the time desired by Stockholder without material disadvantage to Du Pont business interests.

4. *Underwritten Registration Statements.*

(a) If Stockholder, alone or with others with whom Du Pont has entered into agreements similar to this Agreement ("Other Stockholders"), notifies Du Pont in writing that he or they desire to sell Covered Shares having a then current market value of at least $25 million in a firm commitment underwritten offering, Du Pont shall, within five days after receipt of such notification, notify the Other Stockholders in writing that such an offering is

proposed. Other Stockholders desiring to sell shares in such offering shall be permitted to participate therein, provided that such Other Stockholders' written notifications to that effect are received by Du Pont within ten days from the date of Du Pont's notifications to such Other Stockholders. Stockholder shall have an identical right with respect to the Covered Shares, subject to identical conditions with respect to notification, to participate in any such offering proposed by Other Stockholders.

(b) After the close of the ten-day notification period described in Paragraph 4(a), Du Pont shall promptly file and use its best efforts to cause to become effective a registration statement ("Underwritten Registration Statement") covering the shares to be included in such offering, provided, however, that

(1) Du Pont shall have the right to delay the filing and effectiveness of an Underwritten Registration Statement if in the opinion of its investment bankers such offering would interfere with then current financing plans of Du Pont;

(2) Du Pont shall have the right to refuse to proceed with the registration of any shares that are proposed to be sold under this Paragraph 4 in any manner other than a firm commitment underwriting to be managed by Morgan Stanley & Co. or any other investment banking firm acceptable to Du Pont;

(3) Du Pont shall not be required to permit any Underwritten Registration Statement to become effective during any calendar year in which any previously filed Underwritten Registration Statement provided for in this

Paragraph 4 or in the corresponding paragraph in the similar agreements with the Other Stockholders became effective; and

(4) Du Pont shall not be required to permit any Underwritten Registration Statement to become effective while a Registration Statement provided for in Paragraph 3 or in the corresponding paragraph in the similar agreements with the Other Stockholders is in effect.

(c) If Stockholder declines to participate in an underwritten offering proposed in accordance with Paragraph 4(a) by Other Stockholders, then Stockholder shall have no further rights under this Paragraph 4 during the calendar year during which the Underwritten Registration Statement for such offering be[illegible]me effective.

(d) Du Pont will cooperate with the managing underwriter of the firm commitment underwritten offering provided for in this Paragraph 4, and Du Pont will use its best efforts to satisfy the reasonable requirements of such managing underwriter, so that the offering may be completed.

5. *Suspension, Withdrawal or Termination of Registration.*

(a) Du Pont may withdraw any registration statement filed pursuant to this Agreement, suspend or terminate the distribution thereunder or deregister any unsold shares of Du Pont Common Stock registered thereunder if it is advised by the staff of the SEC that they intend to recommend that the SEC commence stop order proceedings pursuant to Section 8 of the Act with respect to any such registration statement. Du Pont will use its best efforts as promptly as practicable to take corrective action to permit sales pursuant to such registration statement.

(b) Stockholder will, upon notice from Du Pont, suspend all sales of Covered Shares pursuant to any registration statement filed pursuant to this Agreement for such number of days as is necessary to permit Du Pont to take such action as shall be necessary, in the opinion of counsel for Du Pont, to comply with the Act.

(c) Du Pont may withdraw any Registration Statement filed pursuant to Paragraph 3 of this Agreement, or suspend or terminate the distribution thereunder and deregister any unsold shares registered thereunder after April 30, in the case of a Registration Statement filed pursuant to notice given to Du Pont during March 16-20, and after October 31, in the case of a Registration Statement filed pursuant to notice given to Du Pont during September 16-20, provided that the date on which Du Pont shall be permitted to suspend or terminate the distribution or deregister shares pursuant to this Paragraph 5(c) shall be extended beyond April 30 or October 31, as the case may be, by that number of days, not in excess of ninety days, during which Stockholder's sales were suspended as provided for in Paragraph 5(b).

6. *Legend on Stock Certificates.*

(a) Stock certificates representing a portion of the Covered Shares, as indicated in the Addendum, shall bear the following legend:

> "The shares represented by this certificate have not been registered under the Securities Act of 1933, as amended, and are subject to certain restrictions with respect to the sale or other disposition thereof under the provisions of such Act. The Corporation will not transfer record ownership of the shares represented by this certificate other than for sales pursuant to an effective registration statement under such Act or upon receipt of an opinion of counsel, or a "no-action" letter from the staff of the SEC, and related application, satisfactory in form and substance to the Corporation to the effect that registration is not required under such Act."

(b) If Stockholder or any of the other persons or entities named in the Addendum receives additional shares of Du Pont Common Stock upon the occurrence of the contingency specified in the Reorganization Agreement, all of such additional shares shall bear the legend set forth in Paragraph 6(a), except that such legend shall not be placed on any shares which, in the opinion of counsel for Du Pont, or as expressed in a "no-action" letter from the staff of the SEC which, together with related application, is satisfactory in form and substance to Du Pont, may be sold or otherwise disposed of without registration under the Act.

(c) Du Pont shall from time to time issue in exchange for stock certificates bearing such legend unlegended certificates (1) upon written request by Stockholder that unlegended stock certificates representing shares of Du Pont Common Stock held by Stockholder be delivered to a broker, dealer or underwriter for sale and delivery pursuant to a registration statement as provided for in Paragraphs 3 and 4; or (2) at any time, if in the opinion of counsel for Du Pont, or in the opinion of counsel for Stockholder, or as expressed in a "no-action" letter from the staff of the SEC, including related application, satisfactory in form and substance to Du Pont, such shares represented by such certificates may be sold or otherwise disposed of without registration under the Act. Stockholder will furnish Du Pont with such information as coun-

sel for Du Pont may reasonably request in connection with such issuance of unlegended certificates.

(d) Stockholder will notify Du Pont in writing within ten days after effecting any sale or other disposition of Covered Shares bearing the legend provided for in Paragraph 6(a), other than sales pursuant to an effective registration statement as provided for in this Agreement. Such writing shall include the number of shares sold or disposed of, a brief description of the transaction, and the name of the transferee if known to Stockholder. Stockholder will supply such additional information as Du Pont shall reasonably request after receipt of the notification.

7. *Expenses.* Stockholder shall pay a percentage, determined by dividing the total number of shares registered in a given registration into the number of shares registered by Stockholder in such registration, of all expenses of any registration which includes his Covered Shares. Such expenses shall include, without limiting the generality of the foregoing, SEC filing fees, all required Blue Sky filing or qualifying fees, underwriting commissions and reasonable fees and expenses of accountants, attorneys, and others performing services in connection with such registration, provided that such expenses shall not include any charge for time expended by any employee of Du Pont nor any expenses incurred which Du Pont would have incurred in the absence of such registration.

8. *Indemnification.*

(a) Du Pont will indemnify and hold harmless Stockholder with respect to shares of Du Pont Common Stock covered by any registration statement provided for in this Agreement or the prospectus as from time to time supplemented and amended against any and all losses,

claims, damages, liabilities and expenses arising out of any untrue statement or alleged untrue statement of a material fact in the registration statement or any omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, unless any such untrue statement or omission or alleged untrue statement or alleged omission was made in conformity with written information given to Du Pont by or on behalf of Stockholder; and Du Pont hereby extends the same indemnity and hold-harmless protection to each officer and director of Stockholder and to each other person, if any, who controls Stockholder within the meaning of the Act.

(b) Stockholder will indemnify Du Pont and hold it harmless with respect to shares of Du Pont Common Stock covered by any registration statement provided for in this Agreement or the prospectus as from time to time supplemented and amended against any and all losses, claims, damages, liabilities and expenses arising out of any untrue statement or alleged untrue statement of material fact or any omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, but only to the extent that such losses, claims, damages, liabilities and expenses arise out of an untrue statement or omission or alleged untrue statement or alleged omission made in conformity with written information given to Du Pont by or on behalf of Stockholder; and Stockholder hereby extends the same indemnity and hold-harmless protection to each officer and director of Du Pont and to each other person, if any, who controls Du Pont within the meaning of the Act.

(c) Du Pont and Stockholder each severally extend the same indemnity and hold-harmless protection re-

spectively extended by Paragraphs 8(a) and 8(b) of this Agreement to any underwriter named as such in any registration statement filed pursuant to this Agreement, provided that such underwriter shall be entitled to such protection only if such underwriter agrees to extend such protection, jointly and severally as to the persons receiving such protection, to Du Pont and Stockholder, and to each officer and director of Du Pont or Stockholder, and to each other person, if any, who controls Du Pont or Stockholder within the meaning of the Act, with respect to written information given to Du Pont or Stockholder by or on behalf of such underwriter for use in preparing such registration statement; and Du Pont and Stockholder each severally extend such indemnity and hold-harmless protection to each officer and director of such underwriter and to each other person, if any, who controls such underwriter within the meaning of the Act.

9. *Duration of Agreement.* This Agreement, including Du Pont's obligation to file any registration statement pursuant thereto, shall terminate when, in accordance with the provisions of Paragraph 6, the legend shall have been removed from all of the legended Du Pont Common Stock indicated in the Addendum.

10. *Third Parties and Successors.*

(a) This Agreement shall inure to the benefit of such persons or entities other than Stockholder who may be named in the Addendum with respect to the shares of Du Pont Common Stock they will receive pursuant to the Reorganization Agreement, provided that such persons or entities agree in writing to be bound by the terms of this Agreement.

(b) This Agreement shall be binding upon, and inure to the benefit of, Du Pont, Stockholder and their respective heirs, assigns, executors, administrators, and successors in interest, provided that any person or other entity who acquires in any public offering (whether or not a registration statement is required) any of the Covered Shares or who acquires in any transaction any unlegended shares of Du Pont Common Stock shall not be bound by or entitled to any benefit of the provisions of this Agreement with respect to such shares.

11. *Notices.* Notices to be given to Du Pont pursuant to this Agreement shall be in writing and shall be given to Treasurer, E. I. du Pont de Nemours and Company, 1007 Market Street, Wilmington, Delaware 19898. Notices to be given to Stockholder pursuant to this Agreement shall be sent to the address specified in the Addendum. Changes of address shall be similarly communicated.

12. *Applicable Law.* This Agreement shall be governed by the law of the State of Delaware.

13. *Adjustment of Number of Shares.* The number of shares to which this Agreement is applicable shall be appropriately adjusted in the event of any division, combination or modification of Du Pont Common Stock, whether through recapitalization, stock split-up, merger, consolidation or otherwise, so that, after such adjustment, there shall be substituted for the number of shares to which this Agreement is applicable before such adjustment, the number of shares of such stock which a holder of such number of shares would hold after the event which required the adjustment.

14. *Entire Agreement.* This Agreement, including the Addendum, expresses the entire understanding of the parties hereto with respect to the subject matter hereof.

15. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

16. *Headings and "Whereas" Clauses.* The headings and the "Whereas" clauses herein shall not be deemed a part of this Agreement.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed as of the day and year first above written.

E. I. DU PONT DE NEMOURS AND COMPANY

By _____

ATTEST: _____

_____

Stockholder

ADDENDUM TO AGREEMENT DATED , 1972
BETWEEN E. I. DU PONT DE NEMOURS AND COMPANY
AND

Name and Mailing Address	*Number of Shares of Christiana Securities Company Stock Held* •	*Number of Shares of Du Pont Common Stock to Be Received Pursuant to the Reorganization Agreement*	
		Unlegended	*Bearing Legend Set Forth in Paragraph 6*

DATED: , 1972

E. I. DU PONT DE NEMOURS AND COMPANY

By .....

ATTEST: .....
Assistant Secretary

.....
Stockholder

• Listed in this column is the number of shares held beneficially of record or through a nominee by the person or entity named in the first column of this Addendum. No shares held of record by Wilmington Trust Company or its nominees are included in this Addendum.

COLLINS EXHIBIT NO. 1

[Letterhead of]

E. I. du Pont de Nemours & Company
Incorporated
Wilmington, Delaware 19898

Executive Offices

October 4, 1972

To the Stockholders of
E. I. du Pont de Nemours and Company

The Boards of Directors of the Du Pont Company and Christiana Securities Company approved in principle on July 17, 1972 a plan under which Christiana would be merged into the Du Pont Company. The proposed merger is subject, among other things, to the receipt of an order from the Securities and Exchange Commission (the Commission) exempting the merger transaction from certain restrictions of the Investment Company Act of 1940 (the Act).

On July 20, 1972 the Du Pont Company and Christiana filed with the Commission a joint application for an order of exemption under the Act with respect to the proposed merger. In connection with such application and pursuant to the requirements of the Act, the Commission issued on October 3, 1972 a "Notice of Filing of Application under Sections 17(b), 17(d) and 6(c) and Rule 17d-1 for an Order Exempting Transactions between Affiliates Incident to a Merger." In accordance with understanding reached with the Staff of the Commission and in the interest of advising stockholders of the Du Pont Company regarding consideration of the proposed merger

by the Commission, a copy of such Notice is enclosed for your information.

Stockholders of the Du Pont Company are not required to take any action with respect to the proposed merger at this time. It is anticipated that a meeting of stockholders will be called later this year, following receipt of the requested order of exemption under the Act, for the common stockholders to act upon the proposed merger. Prior to such meeting you will receive a proxy statement setting forth comprehensive information concerning the proposed merger.

C. B. McCoy
Chairman and President

COLLINS EXHIBIT NO. 1A

Administrative Proceeding
File No. 3-3928

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
In the Matter of
CHRISTIANA SECURITIES COMPANY
E. I. DU PONT DE NEMOURS AND COMPANY
Wilmington, Delaware 19898
(812-3224)
Investment Company Act of 1940

AFFIDAVIT OF RAYMOND J. HARTER

State of New York }
County of New York } ss

I, Raymond J. Harter, after being duly sworn, state the following:

During the course of the proceedings in this matter, I was asked to supply additional information as to the procedure followed by Manufacturers Hanover Trust Company with respect to a letter dated October 4, 1972, sent to the stockholders of E. I. du Pont de Nemours and Company, which included as an attachment a "Notice of Filing of Application" issued by the Securities and Exchange Commission. As I testified in this matter, the Bank holds approximately 258,000 shares of Du Pont stock in approximately 860 separate supervisory accounts. Of this number, the Bank is the sole trustee with no requirement of consultation on proxy matters with any other person as to 275 accounts. The Bank has an additional 70 accounts where it is sole trustee but is limited in the voting of proxies. In addition, there are 125 non-fiduciary supervisory accounts where the voting of proxies is at the direction of the beneficial owner. There are 390 accounts in which there is a co-fiduciary. Even where there is a co-fiduciary, however, the Bank has sole discretion for full voting rights in a total of 29 such accounts. As to such accounts, it would not normally send proxy material or other communications to shareholders. In the remaining 361 accounts, where the Bank has either limited or no voting authority, it would normally send proxy material to the co-fiduciary. The Du Pont letter of October 4, 1972, was circulated to portfolio managers. Since the SEC Notice of Application did not require any shareholder action, the decision was reached not to send it to any co-fiduciary.

In addition, the Bank has approximately 540 custody accounts holding Du Pont stock; it transmitted a copy of the October 4, 1972 letter and accompanying Notice to each of these accounts.

/s/ RAYMOND J. HARTER
Raymond J. Harter

Subscribed and sworn to before me this 13th day of February, 1973.

Notary Public

(SEAL)

[Letterhead of]

RASSIEUR, LONG, YAWITZ & SCHNEIDER
700 BOATMEN'S BANK BUILDING
314 NORTH BROADWAY
ST. LOUIS, MISSOURI 63102

October 26, 1972

AIR MAIL

Secretary, Securities & Exchange Commission
Washington, D. C. 20549

Dear Sir:

I request a hearing in the matter of Christiana Securities Company merger with E. I. du Pont de Nemours & Company.

The nature of my interest is that I have been a common stockholder of du Pont for more than ten years and I also represent Mrs. Lee G. Collins, who has been a common stockholder for more than seven years.

I believe that the proposed merger of the two corporations is unfair to the common stockholders of du Pont.

The issue of fact which I controvert is the valuation of Christiana at 97½% of the adjusted value of its net assets as set forth in the notice sent to the du Pont stockholders.

I have not had an opportunity to determine whether the net asset value of Christiana as shown in the notice, $2,223,425,827.00, was actually correct, but assuming without conceding that said figure was correct, the valuation of Christiana common stock for merger purposes was incorrect.

The notice, dated October 3, 1972, filed with the Securities and Exchange Commission stated that a special

board of du Pont directors selected an investment banking firm to advise on the proposed merger terms. It further states that this special committee consisted of two directors with no director, officer or employee relationship with Christiana.

In the notice of the annual meeting of du Pont, dated March 8, 1972, du Pont Company denied that Christiana was its parent, although Christiana owned more than one-fourth of the outstanding common stock of du Pont, and no other du Pont single stockholder held anywhere near this amount. As a practical matter, I suggest that no one could have been elected to the present board of du Pont without the approval of Christiana Securities Company and, therefore, the special committee of du Pont directors mentioned in the present application were elected to the board of du Pont with the support of Christiana Securities Company.

Furthermore, in the du Pont Proxy Statement, dated March 8, 1972, it was shown that the stock holdings of the entire Board of Directors of du Pont were greater in Christiana Securities Company common stock than they were in du Pont common stock.

The very fact that historically Christiana common stock had sold on the open market at a discount ranging from 20% to 25% is better proof of its value than the appraisal made at the direction of certain directors of du Pont.

While the discount of 20% to 25% prevailing for Christiana has been reflected in sales of a relatively small number of shares, compared to the total issued shares, nevertheless it is apparent that in the proposed merger this discount should be recognized more than it has been. I state that on behalf of the common stockholders of du Pont the discount should be at least 10% so that Christiana

should be valued at 90% at the adjusted value of its net assets.

Very truly yours,

/s/ RICHARD J. COLLINS, JR.
Richard J. Collins, Jr.

RJC: es
cc: Christiana Securities Company
Wilmington, Delaware 19898
E. I. du Pont de Nemours and Company
Wilmington, Delaware 19898

I, RICHARD J. COLLINS, JR., hereby certify that I sent a copy of the above request by Air Mail to Christiana Securities Company and E. I. du Pont de Nemours and Company, both located in Wilmington, Delaware 19898.

/s/ RICHARD J. COLLINS, JR.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

—

September Term, 1975

—

No. 75-1100

Richard J. Collins, Jr., Petitioner,

v.

Securities and Exchange Commission, Respondent.

No. 75-1262

Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib, etc., Petitioner,

v.

Securities and Exchange Commission, Respondent.

No. 75-1263

Lewis C. Murtaugh, Trustee for Emanuel and Helen Steib, etc., Petitioner,

v.

Securities and Exchange Commission, Respondent.

—

PETITION FOR REVIEW OF ORDER OF THE SEC

———

ORDER

———

Before: HEANEY, STEPHENSON, Circuit Judges,
SMITH, Senior District Judge

Professor Roger B. Upson, Associate Dean of the University of Minnesota College of Business Administration, has been appointed by this Court as a contract consultant in the office of the Circuit Executive for the United States Court of Appeals for the Eighth Circuit. Professor Upson will assist the Court in understanding the record made in the above entitled case by the Securities and Exchange Commission, and will prepare reports and memoranda for the Court in connection with that function. His duties will not include giving opinions as to the fairness and reasonableness of the merger.

Reports made to the Court by Professor Upson will be filed with the Clerk of Court and copies of the reports will be furnished by the Court to counsel for the parties. The parties will be given an opportunity to respond to reports submitted by Professor Upson by filing with the Clerk of this Court a response thereto within five (5) days after the receipt of the report from the Clerk of Court.

The parties will not be required to bear the expenses incurred by the Court in retaining Professor Upson.

Dated: October 9, 1975

REPORT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT BY ROGER B. UPSON ON QUESTIONS ASKED BY THE COURT

December 9, 1975

CONTENTS

		Page
1.	What literature is there on the subjects of premiums paid in mergers, the value of control, and the concept that an arms-length merger could benefit one party substantially but provide little benefit to the other party?	1
2.	Explain the stock purchase from dividends procedure suggested by Kidder, Peabody, and Co.	9
3.	Summarize the literature on the relationship between net asset value and market price for closed-end investment companies.	11
4.	What literature is there on the impact on share price of the trading of a large block of stock?	13
5.	Has the volume of trading in Christiana increased since the announcement of the possible merger and if so, is this evidence of pressure on the Du Pont family to sell?	15
6.	What are the discounts from net asset value at which Christiana common stock has sold between 1967 and April 1972, excluding dates for the period of the Hercules Co. exchange offer?	19
7.	Analyze the numbers of shares that will theoretically be available for sale under the provisions of the last paragraph on page 3 of Amendment No. 6 to the Application for Approval of the merger.	20
8.	What is the Federal income tax basis to present holders of Christiana common stock?	24
9.	What literature is there on the relevance of book value as a determinant of value?	25
10.	Why is the capital gain tax rate shown at 30 percent in several places?	26
11.	Analyze the concepts of "dispersal of stock" and "control of management" presented in the testimony of Messrs. McCoy and Shapiro and in the Findings and Opinion of the Commission.	27

12. Analyze the estimates of taxes in a section 333 liquidation in terms of the discount applicable to Christiana's net asset value. 33

13. What was the valuation of the Christiana stock, as a percentage of net asset value, in the cases of *Paulina du Pont Dean v. Commissioner,* 19 TCM 281 (1960), and *Mary A. B. du Pont, et al., Executors v. Commissioner of Internal Revenue,* 38 U. S. Bd. Tax Appeals 926 (1938)? 36

14. How has Du Pont been affected by the Investment Company Act of 1940? 38

15. Estimate the amount realizable by a hypothetical Christiana common stockholder who sells stock on April 28, 1972, or receives shares of Du Pont representing 97.5 percent or 87.9 percent of net asset value in a merger and sells the Du Pont shares at April 28, 1972 prices, assuming a 35 percent capital gains tax rate and a $25 per share cost for tax purposes. 39

16. Evaluate the advantages and disadvantages of the proposed merger to the common stockholders of Christiana and Du Pont, as listed in Exhibit 5 of Kidder Peabody's report. 40

17. What are the effects upon Christiana common stock and Du Pont common stock of various discount values and dividend policies? 48

1

1. What Literature Is There on the Subjects of Premiums Paid in Mergers, the Value of Control, and the Concept That an Arms-Length Merger Could Benefit One Party Substantially But Provide Little Benefit to the Other Party?

1.1 Paul J. Halpern, "Empirical Estimates of the Amount and Distribution of Gains to Companies in Mergers," *The Journal of Business,* Vol. 46, No. 4 (October 1973) pp. 554-575.

Professor Halpern analyzes 77 mergers occurring between 1950 and 1965. These were mergers of non-regulated companies involving the exchange of common stock where both stocks were listed on the New York Stock Exchange. The data for his analysis come from the files of the Center for Research in Security Prices at the University of Chicago, cross-checked against the *Wall Street Journal,* Moody's, and listing statements of the New York Stock Exchange.

The paper presents estimates of gains to both the acquired and the acquiring companies. These gains are based on the change in the total market value of the common stock of each company between the time the merger was first considered (the base date) and the actual merger date. The determination of the base date rests on a statistical analysis of stock prices. That analysis concludes that most companies have the news of a forthcoming merger discounted from 7 months before the formal announcement date. Thus, the end of the eighth month before the announcement date is used as the base date.

2

Between the base date and the merger date both the stock market in general and stocks in the merging companies'

industries may rise, fall, or remain stable. Such general market movements need to be removed in an analysis of gains to merging companies, so as to isolate the impact of the merger. Professor Halpern uses regression analysis to determine the size of both general market movements and movements of stocks in the merging companies' industries. In the tables in the paper, "unadjusted" gains are those before removal of the market and industry effects, while "adjusted" gains are after the deduction of these effects, while

The principal conclusion is that:

"the larger company does not give away everything in a merger; the mean adjusted gain to the larger company is positive and the total adjusted gain is divided evenly, on average." (p. 573).

Assuming the relevancy of this study to the proposed Du Pont-Christiana merger, the merger terms would reflect an even division of the gains accruing to both parties. Because the merger has not been consummated, the gains cannot be measured in precisely the same way as in Professor Halpern's study. Appendix A to this answer shows the basis used for an illustration of the application of Professor Halpern's method to the proposed Du Pont-Christiana merger. Based on Appendix A, an exchange ratio of 1.001 shares of Du Pont per share of Christiana would reflect an even division of the gains resulting from the merger. This compares with the proposed exchange ratio of 1.123.

3

The author also observes that although the total adjusted gain was divided evenly, on average, the size of the gain relative to the size of the smaller company was larger than the size of the gain relative to the size of the large company. Thus, Halpern's findings are broadly consistent

with other studies that focus on the percentage gain to the selling, or smaller company. These studies have found substantial premiums (unadjusted gains) accruing to selling companies.

APPENDIX A

COMPUTATION OF EXCHANGE RATIO ASSUMING AN EVEN DIVISION OF THE GAIN.

Base Date

Halpern uses the end of the eighth month before the announcement date as the base date. In the proposed Du Pont-Christiana merger, April 28, 1972 was the announcement date. Thus the base date would be August 31, 1971.

Merger Date

Because the Du Pont-Christiana merger has not taken place, there is no merger date. However, the merger terms were announced and a three month period elapsed before the merger was challenged. Thus, as a proxy for actual merger data, the average of data for July 18, 1972 (the day after the terms were announced) and Oct. 27, 1972 (the day before the challenge to the merger was announced in the Wall Street Journal) will be used.

4

Computation of Adjusted Gain

To remove the impact of changes in the general level of stock market prices, the changes in Christiana and Du Pont common stock prices will be adjusted by changes in the Dow Jones Industrial Index.

STOCK MARKET DATA

Date	*Christiana*	*Du Pont*	*Dow Jones Index*
August 31, 1971	$131.5	$151.75	898.07
July 18, 1972	$168	$162.75	911.72
Oct. 27, 1972	$182	$168.875	946.42

Source: Applicants' Joint Exhibit 7.

This is less precise than the procedure used by Halpern, but is based on data available in the record.

	Christiana	*Du Pont*	*Total*
Market value at base date [a]	$1,539,878,500	$5,163,853,700	
Adjusted increase in value [b]			
through July 18, 1972	397,964,960	291,399,360	689,364,320
through Oct. 27, 1972	482,481,040	289,163,400	771,644,440

5

a. Based on number of shares outstanding times closing price shown above. 11,710,103 × $131.5 for Christiana and 34,028,690 × $151.75 for Du Pont. In Du Pont's case, the shares owned by Christiana have been excluded from the total because they will be retired in the proposed merger, and the gain on those shares is subsumed in the Christiana shares.

b. These increases are the result of multiplying the market value at base date by the adjusted change in stock prices, and deducting the base date value:

	Unadjusted Changes			*Adjusted Changes*	
	Christiana (1)	*Du Pont* (2)	*Dow Jones* (3)	*Christiana* (1)/(3)	*Du Pont* (2)/(3)
July 18, 1972 divided by Aug. 31, 1971	1.278	1.072	1.015	1.258	1.056
Oct. 17, 1972 divided by Aug. 31, 1971	1.384	1.113	1.054	1.313	1.056

The estimated adjusted gain is the average of the totals shown above, i.e. $730,504,350.

6

Exchange Ratio

If the estimated adjusted gain were split evenly between the two companies, the exchange ratio would be 1.001, as shown below.

Computation of Exchange Ratio

Market value of Du Pont at base date	$5,163,853,700
add half of adjusted gain	365,252,170
	$5,529,105,800
Divide by number of shares outstanding	34,028,690
equals adjusted Du Pont price	$162.48
Market value of Christiana at base date	$1,539,878,500
add half of adjusted gain	365,252,170
	1,905,130,600
divide by adjusted Du Pont price	$162.48
equals number of Du Pont shares to be exchanged for Christiana shares	11,725,060
divide by number of Christiana shares outstanding	11,710,103
equals exchange ratio	1.001

7

It is important to note that this is an illustration of the application of Professor Halpern's method to the proposed Du Pont-Christiana merger. The limitations of the illustration are

(1) the merger never having occurred, there is no merger date. The exchange ratio calculated above is sensitive to the choice of data. For example, if Oct. 17, 1972 had been used by itself as the proxy for the merger date, the exchange ratio based on an even division of the estimated adjusted gain of $771,644,440 would have been 1.008, rather than 1.001 shown above.

(2) the removal of general market effects is based on a simpler procedure than that used by Professor Halpern, but is based on data available in the record.

1.2 J. Fred Weston, "The Determination of Share Exchange Ratios in Mergers," in W. W. Alberts and J. E. Segall, (editors), *The Corporate Merger* (University of Chicago Press, 1974), pp. 117-138.

Although most of this chapter is concerned with mergers of firms in different industries, there are two generally applicable remarks.

First, the economic basis for a merger rests on the idea that both parties may be able to gain from the transaction. Thus, the act of merging enables a benefit to be realized which could not be realized if the parties stayed independent. (p. 131).

Second, the valuation problem in mergers is to apportion the additional benefit, arising out of the merger, between the parties to the merger. This could vary from a situation where all the increase in value goes to one party, to a situation where the benefits are shared. The outcome would depend on the contributions of the parties and their relative need to go through with the merger. (p. 131).

8

1.3 Samuel Schwartz, "Merger Analysis as a Capital Budgeting Problem," in Alberts and Segall, *op. cit.* pp. 139-150.

Schwartz analyzes the factors involved in setting the maximum price a company can afford to pay to acquire another. The introductory section (pp. 139-140) provides a useful framework for analyzing this problem. His first proposition (foot of p. 139) introduces tax considerations as a relevant factor in price-setting. This is illustrated at pp. 147-148.

Tax considerations are relevant to the proposed Du Pont-Christiana merger. One of the benefits to Christiana

stockholders is that a tax-free exchange of Christiana stock for Du Pont stock would eliminate any future capital gains tax liability on Christiana because the Du Pont stock it holds has a low tax cost basis relative to the market price (see question 8, later). In addition, the proposed merger would remove the intercorporate dividend tax which Christiana pays on dividends it receives.

9

2. Explain the Stock Purchase From Dividends Procedure Suggested by Kidder, Peabody, and Co.

Kidder, Peabody suggests a procedure that is now often available for holders of common stock in closed-end investment companies. Stockholders can elect to receive dividends in cash or stock. The dividends of those electing stock are paid to a trustee. The trustee is authorized by the electing stock-holders to use cash received from dividends to buy common stock in the company and remit the stock to the stockholders. The trustee may buy in the open market or from the company at net asset value, whichever is lower. The alternatives of cash or stock have the same income tax liability to the stock-holders. The procedure is described in Division's Exhibit 12, pp. 11-12, Kidder, Peabody, and in Mr. Midgley's testimony, A363-370.

The purpose of this procedure is to attempt to bring the market price closer to the net asset value, by introducing additional demand for the Christiana stock. Kidder, Peabody's report states:

". . . it is our judgment that such a plan could significantly reduce, if not eliminate, the market discount over a period of time." (Division's Exhibit 12, p. 12, Kidder, Peabody).

In the Kidder, Peabody report, it is stated that if 50 percent of the Christiana shareholders were to choose such a procedure, the average daily volume of sales of Christiana stock would be doubled. This can be confirmed reasonably closely as follows:

10

Total dividends on Christiana common stock, 1971 (= 11,710,103 common shares ×$5.25 per share; total is also shown in Joint Exhibit 1B, Exhibit 6, Morgan Stanley).	$61,478,000
50 percent of total dividends	$30,739,000
Divide by 52 for amount per week	$ 591,135
Compare average weekly dollar volume for Christiana, January through June 1972 (Division's Exhibit 12, unnumbered page, Kidder, Peabody).	$ 628,232

This calculation assumes that "50 percent of Christiana Shareholders" is interpreted as 50 percent of outstanding stock, and that prices and volumes in the first six months of 1972 are an appropriate comparison.

However, the 50 percent participation rate in this plan is based on an estimate. Mr. Midgley testified:

"We just guesstimated 50 percent . . . Christiana could have tried the plan. . . We will never know until they do what the response would have been." (A. 364).

The Kidder, Peabody report indicated that two plans of this type "enjoyed participations in excess of 50% in 1971" (Division's Exhibit 12, p. 12). Mr. Midgley's testimony refers to the plans of Madison Fund and Paul Revere Fund. The year end relationship between market price and net asset value for these two funds shows discounts from net asset value varying between 3 and 39 percent for the years 1971 through 1974, according to Table 5 in Weisenberger Services Inc., *Investment Companies* (1975 edition), p. 52.

11

3. Summarize the Literature on the Relationship Between Net Asset Value and Market Price for Closed-End Investment Companies.

Closed-end investment company common stocks have sold at both premiums and discounts from net asset value. The average discount or premium on a sample of such stocks of investment companies with diversified portfolios has varied from a high of more than an 8 percent premium in 1970 to a low of about a 22 percent discount in 1974, according to data in Weisenberger Services, Inc., *Investment Companies* (1975 edition), p. 22.

The subject of discounts and premiums from net asset value is analyzed infrequently in the literature, and then usually in the context of closed-end funds with diversified portfolios. For example, Burton G. Malkiel in *A Random Walk Down Wall Street* (New York: Norton and Co, 1973) states that relatively low average returns on assets, unrealized capital gains in fund portfolios, and lack of sales effort by stockbrokers are possible explanations for discounts (p. 219). A lengthier analysis is by Kenneth J. Boudreaux, "Discounts and Premiums on Closed-End Mutual Funds: A Study in Valuation," *Journal of Finance*, vol. 28, no. 2, May 1973, pp. 515-522. Based on data for 1960-1970 for the stocks and assets of the thirteen closed-end investment companies that invested only in marketable securities, Boudreaux concludes that discounts and premiums are related to market expectations of the future performance of the funds.

12

In the SEC file and the joint appendix, there are some materials on the discount from net asset value experienced by Christiana, a non-diversified, closed-end fund. The Covington and Burling memo, "Factors to be considered in report of investment bankers", (Division's Exhibit 1, Appendix A, Attachment 2), draws attention to Christiana's discount. It states, "The investment bankers report should consider all pertinent factors explaining the existence of this market discount." The Kidder, Peabody report summarizes such factors explicitly (Division's Exhibit 12, p. 7):

(a) unrealized capital gains liabilities
(b) thin market
(c) Federal income tax on intercorporate dividends
(d) lack of investor familiarity.

Morgan Stanley (Applicants' Joint Exhibit 1B, Exhibit 2, p. 6) lists

(a) Federal income taxes and expenses payable by Christiana
(b) large unrealized capital gains
(c) relatively limited market for Christiana common stock.

The Findings and Opinion of the SEC (A. 15-42) refer to the discount and suggest that "the relative illiquidity of an investment in Christiana" affects the discount (A. 36). Finally, Mr. Harter testified that the discount reflected primarily the capital gains tax liability. (A. 377).

13

4. What Literature Is There on the Impact on Share Price of the Trading of a Large Block of Stock?

This subject was investigated in the *Institutional Investor Study Report of the Securities and Exchange Commission* (92nd Congress, 1st Session, House Document 92-64; Washington, U. S. Government Printing Office, 1971), chapter eleven, "Characteristics and Price Impacts of Block Trading in Common Stock Listed on New York Stock Exchange," pp. 1537-1828. The results are presented in a more compact form in Alan Kraus and Hans R. Stoll, "Price Impacts of Block Trading on the New York Stock Exchange," *Journal of Finance*, vol. 27, no. 3, June 1972, pp. 569-588.

The study is based on 1,565 block trades occurring between July 1968 and September 1969. Only trades of more than $1 million were used, and included the largest 27 NYSE stocks and a random sample of 198 of the remaining stocks. The impacts are measured relative to a market index.

Conclusions on price impacts on the day of the block trade are as follows. When a block trade is initiated by a buyer, the stock price tends to rise and stay at the new level. On the average, the price rises 1.4 percent between the closing on the day prior to the trade, and the trade itself. When a block trade is initiated by a seller, the stock price drops and then rises. Between the prior day's closing and the block trade, the price declines 1.81 percent, but then recovers 0.7 percent by the end of the day, on average.

14

When the study is extended to 20 trading days before and after the block trade, the trades initiated by buyers are accompanied by a 4 percent price rise before the trade and no decline after the trade. For trades initiated by sellers, there is a 1 percent drop in the 20 days preceding the trade and an offsetting rise in the succeeding days.

From the viewpoint of the initiating buyer and seller, these price impacts would be amplified by a commission,

approximated by Kraus and Stoll at 0.6 percent. By way of comparison, they noted that the average cost of a secondary distribution, based on 56 such secondaries in 1967-1970, was 4.47 percent. The apparent total cost to an initiating block trade seller, however, would have been approximately 3.4 percent (1 percent in the prior 20 days, 1.8 percent on the trading day, and 0.6 percent commission) plus or minus the movement in the market during the 21 day period.

15

5. Has the Volume of Trading in Christiana Increased Since the Announcement of the Possible Merger and if So, Is This Evidence of Pressure on the Du Pont Family to Sell?

Compared to the average weekly volume of trading in the six months prior to the announcement of the possibility of a merger, trading increased significantly in the last six months of 1974 and the first six months of 1975.

Volume of trading in Christiana

Dates	*Weekly volume in number of shares*	
	Average	*Median*
Nov. 1, 1971-Apr. 28, 1972 (the base period)	5,067	5,000
May 1-Oct. 27, 1972 (six months after announcement)	5,885	4,450
Jan. 1-Jun. 29, 1973	6,173	4,700
Jul. 2-Dec. 28, 1973	8,812	7,950
Dec. 31, 1973-Jun. 28, 1974	5,581	5,000
Jul. 1-Dec. 27, 1974	11,735	9,150*
Dec. 30, 1974-Jun. 27, 1975	16,531	13,950*

* indicates statistically significantly different median from the base period.

Source: Derived from Applicants' Joint Exhibit 1B, Exhibit 8, Applicants' Joint Exhibit 7 (Morgan Stanley), and *Daily Stock Price Record: OTC Stocks* (Standard and Poor's Corporation, 1973-1975).

16

The 26 weekly volumes for each six month period in the table above were compared to the 26 weekly volumes in the six-month period preceding the announcement (the base period). The purpose of each comparison was to test whether the weekly volumes for each period could have been drawn from the same population. The test is conducted by arranging the weekly volumes in size order and counting the number of times that volumes from each period are adjacent to one another. For example, the first few entries of the comparison between the base period and the May-October 1972 period are as follows:

base period volumes	*May-Oct. 1972 volumes*
	18,300
	17,600
	10,800 *
10,300 *	
	9,900 *
9,400 *	
	9,300 *
9,100	
8,900	
7,800 *	

The asterisks mark the end of each group of volumes from the same period. Six groups, or "runs", are shown above.

17

Tabulations of the probability of observing various numbers of runs, given the number of total observations, ($52 = 26 \times 2$) in this case, have been compiled by Frieda S. Swed and C. Eisenhart, "Tables for Testing Randomness of Grouping in a Sequence of Alternatives," *Annals of Mathematical Statistics*, vol. 14, (1943) pp. 66-87.

Based on those tabulations, the probability that the weekly volumes of trading in the last six months of 1974 and first six months of 1975 were drawn from the same

population as the weekly volumes in the base period is substantially less than 1 in 200. In addition, there is only a 1 in 40 chance that volumes in the first six months of 1973 are drawn from the same population as volumes in the base period.

The differences in trading volumes all occur in periods beyond the record. If the question is confined to the period covered by the record, the answer is that the weekly volume of trading did not change significantly after the announcement of the proposed merger.

The subject of trading in Christiana shares is covered in the testimony of Mr. Charles C. Townsend, Jr., A. 207-211. He is of the opinion that the volume of trading increased, but not so much as to lead him "to the conclusion that a significant body of Christiana stockholders are so oriented toward profit that they would take advantage of a similar opportunity." (A. 210). In addition, Mr. Midgley stated, ". . . and also from looking at the trading activity after the announcement of the exploration of this transaction, that the Christiana stockholder did not seem to be trading-oriented; he was not an in-and-out kind of investor." (A. 354).

18

Finally, there were relatively few insider transactions reported. The March 1974 disposal of 49,400 shares presumably involved some non-market transfers, because only 34,800 were reported as traded that month.

	no. of shares	
	disposals	*acquisitions*
July 1972	600	
Dec. 1973	300	
Mar. 1974	49,400	
Apr. 1974		7,436
Nov. 1974	10,080	
Jun. 1975	200	

Source: *Daily Stock Price Record: OTC Stocks* (Standard and Poor's Corporation, 1973-1975).

19

6. What Are the Discounts From Net Asset Value at Which Christiana Common Stock Has Sold Between 1967 and April, 1972, Excluding Dates for the Period of the Hercules Co. Exchange Offer?

	Discount from net asset value 1967-1972 (Percent)					
At end of Month	*1967*	*1968*	*1969*	*1970*	*1971*	*1972*
January		17.0	17.7	18.6	29.4	25.2
February		15.6	18.2	23.8	23.9	27.0
March		18.7	20.9	18.6	21.9	27.3
April	10.5	16.8	21.6	20.3	25.6	23.5
May	9.7	19.6	20.0	30.3	24.9	
June	13.5	18.7	20.0	21.4	22.0	
July	13.5	15.3	18.9	22.7	25.3	
August	15.0	19.4	18.6	23.0	24.9	
September	13.7	18.2	17.8	22.5	25.3	
October	13.1	16.9	21.1	23.6	25.6	
November	14.9	18.2	20.7	24.5	20.4	
December	15.8	17.3	20.6	26.7	24.5	

Source: Applicants' Joint Exhibit 1B, Exhibit 7 (Morgan Stanley) and *Moody's Bank and Finance Manual, 1973.*

20

7. Analyze the Numbers of Shares That Will Theoretically Be Available for Sale Under the Provisions of the Last Paragraph of Page 3 of Amendment No. 6 to the Application for Approval of the Merger.

If the proposed merger is consummated on the present terms, between 9.2 and 9.9 million Du Pont shares to be issued would be subject to restrictions. The number of these shares available for sale depends on the wishes of the holders, the ability of the market to absorb the shares, and the terms of the restrictions. Consequently there is no single-numbered answer to the question raised.

Each restriction is analyzed in terms of its implications for numbers of shares, and a final table relates these

numbers to the total outstanding shares of Du Pont and to the volume of shares traded in 1972.

The above-mentioned paragraph of Amendment 6 provides for three situations in which restricted shares may be sold:

a. ". . . during the months of April and October of each year in any lawful manner other than firm commitment underwritten offering."

Mr. L. E. Grimes, Assistant Treasurer of Du Pont testified that:

"It would be my expectation that the sales made in the April and October registrations in the main would be made through normal stock exchange channels." (A. 411)

21

Two kinds of trading are possible. One is through the ordinary course of the auction market, the other is through a block trade in which the selling broker searches and negotiates for a matching interest on the other side of the market. The volume of Du Pont shares traded on the New York Stock Exchange is shown in Applicants' Joint Exhibit 1B, Exhibit 7, and in Applicants' Joint Exhibit 7 (both Morgan Stanley). The volumes recorded include both ordinary and block trade transactions.

As an illustration of the volumes involved, in the first six months of 1972, the median daily volume of shares sold was 12,000. Almost half of all the daily volumes were between 10,000 and 20,000 shares. However, three days between February 22 and 28, 1972 showed volumes of 109,300, 115,700, and 125,600 shares. These data give some idea of the usual size of the market and of its flexibility. Furthermore, block trades over $5 million are relatively infrequent, based on data in the *Institutional In-*

vestor Study Report of the S. E. C. At an average price of $165 in the first six months of 1972, $5 million of Du Pont stock would be approximately 30,000 shares. Total daily volume exceeded 30,000 on ten percent of the trading days in the first six months of 1972.

The relevance of these data is that the market has shown the capacity to handle occasional very large volumes, such as 100,000 shares, and appears flexible between 10,000 and 20,000 shares. Consequently, these data may give some indication of the volume of shares that could be marketed under situation 1.

22

b. ". . . at one other time during each year in a firm commitment underwritten offering of at least $25 million in then current market value of such shares."

At an average price of $165 in the first six months of 1972, $25 million of Du Pont stock would approximate 153,000 shares. However, secondary offerings can be much larger than $25 million. In 1972, the six largest secondary offerings of industrial corporations ranged between $90.5 million (PPG Industries) and $239.8 million (Gulf Oil Corporation) according to Du Pont Exhibit 2 (First Boston Corp.). This range could imply that between 548,000 and 1,453,000 shares of Du Pont could be distributed in a secondary offering.

c. ". . . 'brokers' transactions' . . . may not exceed, for any person in any six-month period, approximately one week's reported trading volume in Du Pont common stock."

Weekly reported trading volume averaged 86,792 shares in the first six months of 1972. In Mr. Grimes' testimony, he estimates that this provision could mean a vol-

ume of 50,000 to 60,000 shares in a six-month period. He also indicated that transactions would have to be conducted separately by each seller; any acting in concert would probably result in the provision applying to the total sales by all sellers involved.

The following table relates the volumes of shares mentioned above to the outstanding shares of Du Pont and to the annual volume of shares traded in 1972.

23

Number of shares	*As percent of:* *Outstanding shares of Du Pont (47,445,810)*	*Annual volume of shares traded, 1972 (3,945,100)*
10,000	0.02	0.25
20,000	0.04	0.51
100,000	0.21	2.53
153,000	0.32	3.88
548,000	1.16	13.89
1,453,000	3.06	36.83
86,792	0.18	2.20

Of the above-listed numbers of shares, those arising out of a secondary offering are larger, as a percentage of outstanding shares, than those referred to in the testimony from the *General Motors* relief proceedings included in the Joint Appendix. That testimony is summarized in Mr. Murtaugh's Brief, p. 63, ". . . the market impact on General Motors would be 15% from a program of selling 0.7% of General Motors for ten years (postponable in bad years)."

For the remaining numbers of shares, the price impacts are covered in the answer to question 4 concerning trades of large blocks of stock.

24

8. What Is the Federal Income Tax Basis to Present Holders of Christiana Common Stock?

Christiana Exhibit No. 4 (A. 765) presents data on this question, summarized below.

Basis	*No. of shares* [a]	*Percent of total* [a]	*Percent of subtotal*
$ 0	2.9 mm	25.1%	35.7%
$ 0.01-25.00	3.1	26.6	37.8
$25.01-50.00	0.7	6.4	9.1
$50.01-100.00	0.8	7.3	10.3
$100.01-150.00	0.2	2.0	2.8
over $150	0.4	3.0	4.3
	8.2	70.3	100.0
Held by tax-exempt organizations	1.3	11.0	
No information available	2.2	18.7	
Total shares outstanding	11.7	100.0	

a. Items do not add to totals because of rounding.

This information is broadly consistent with that used in Division's Exhibit 2A (Dechert Price and Rhoads). In that Exhibit, 458,240 shares are assumed to have a very high basis (greater than $150) whereas the Christiana Exhibit shows only 350,275 shares with a basis greater than $150.

25

9. What Literature Is There on the Relevance of Book Value as a Determinant of Value?

"*Significance of Book Value.* In industrial common-stock analysis, book value is seldom regarded as an im-

portant determinant of investment value, largely for the reason that it usually bears little relationship to the earning power of the company. Goodwill, for example, or the value of a trade name, may be carried at a negligible figure in the balance sheet and yet may be a major factor in the competitive position and consequently in the earning ability of a manufacturing concern."

Graham, Dodd and Cottle, *Security Analysis, Principles and Technique,* (McGraw-Hill) pp. 596, 4th edition.

26

10. Why Is the Capital Gain Tax Rate Shown at 30 Percent in Several Places?

The references to a 30 percent capital gain tax rate are in situations where a corporate capital gain is being discussed. For example, Mr. Harter refers to a 30 percent tax when he discusses the capital gains tax liability of Christiana. (A. 377):

". . . the Du Pont common stock owned by Christiana had a market value of well over $2 billion, and a tax cost basis of $74, $75 million, the balance being the unrealized appreciation subject to tax. At a 30 percent tax rate, the capital gains tax on that appreciation would be equivalent to about 29 percent of the total market value of the securities held."

The Tax Reform Act of 1969 raised the capital gains tax rate for corporations from 25 to 30 percent, with a phase-in period for 1970 and 1971. Consequently any discussion of a capital gains tax for a corporation for 1972 or later should refer to a 30 percent rate.

27

11. Analyze the Concepts of "Dispersal of Stock" and "Control of Management" Presented in the Testimony of Messrs. McCoy and Shapiro and in the Findings and Opinion of the Commission.

1.11 *Relevant Quotations.*

Mr. Shapiro testified that the dispersal of a block of 28 percent of du Pont stock in the hands of Christiana appealed to him "as the central consideration from the du Pont standpoint" (A. 452). His reason is that, "from my standpoint the critical consideration for the future of the du Pont company . . . is that there not be a block of 28 percent of du Pont shares in hands of people who have no familiarity with the chemical business and with the du Pont Company in its detailed operations. And it is the elimination of that kind of an uncertainty for the future which seems to me so overbearing in importance that the merger is the greatest news that I can think of for the du Pont Company." (A. 453).

Later, Mr. Shapiro stated, "On the other hand, one could foresee that there will be fine young people with zero interest in the chemical business, the chemical industry. There may be some who have no financial acumen. There may be some who get into financial difficulty. There may be some who are tempted to turn a fast buck and sell their shares to someone who wants to get control of . . . Christiana by getting a significant block of Christiana shares." (A527-528).

Mr. McCoy testified that the proposed merger was "a solution of what I thought was a long-term Christiana problem . . . I had in mind

28

only in a very general way the long-term composition of the board of the du Pont Company. And knowing the difficulties of obtaining the kind of board that a major corporation needs these days, I was concerned that what would be the position way out with respect to the Christiana group. And this seemed to me to present the possible solution to that problem, if it developed to be a problem. I had no way to tell . . . the only way that it could be a solution would be if the block itself were broken up so that it was not there as a target for somebody to go after or would not fall into the hands somewhere down the line of either a group of people who would be unable to discharge the responsibility that went with it or might have serious differences of opinions and lead to factional representation." (A576-577).

The S. E. C. found these views puzzling. It drew attention to the applicants' reiteration that the proposed merger would not lead to a large number of Du Pont shares coming to the market, and concluded that "the dispersal will be formal, not substantive" (A. 28). On the issue of possible long-term adverse consequences from the Christiana holdings, the S. E. C. states, "The argument rests on the possibility of a future clash between the people then in control of Christiana and the people then managing Du Pont. It assumes that in this hypothetical situation the Du Pont managers will be the "good guys" and the Christiana control group the "bad guys". The argument seems far-fetched and rests on premises we consider unacceptable. Christiana's extinction may well make it somewhat easier for Du Pont's managers to maintain themselves in office.

29

We, however, cannot presume that this will necessarily be in the Du Pont stockholders' interest." (A. 29)

11.2 *Dispersal of Stock*

The concept of dispersal has application at two levels in this case. First, dispersal can refer to the distribution of a block of shares by sale in the market place to a large number of buyers. Second, dispersal can refer to the destruction of a block of votes by spreading the votes over a number of voters. Distribution in the market place and destruction of a block of votes occur simultaneously in situations such as secondary offerings.

In the present case, the two dispersals are separable. If the merger is consummated, existing Christiana shares will be exchanged for new Du Pont Company shares. This exchange will destroy the block of votes, because the individual Christiana stockholders will be able to exercise directly the votes of the Du Pont shares they receive. The exchange does not involve a market transaction, and thus dispersal through sale in the market does not apply at this point.

Dispersal through market transactions may occur after the exchange. The possibility and probability of such market transactions are discussed throughout the record, and such transactions would further disperse ownership and votes. However, the initial dispersal of votes would have been achieved in the exchange of stocks.

Thus, a real dispersal of a block of votes can occur in the present situation without requiring a simultaneous market transaction.

30

When the S. E. C. concluded that the dispersal would be formal, it was considering market dispersal rather than

vote dispersal, whereas Messrs. McCoy and Shapiro were considering vote dispersal.

11.3 *Control of management*

The record does not provide a clear answer on the question of whether Christiana controls Du Pont. Three pieces of evidence favor control. First, there is a history of control in previous years, including the time when Christiana was incorporated. Second, the Investment Company Act of 1940 presumes that any block greater than 25 percent constitutes control. Christiana owns 28.3 percent of Du Pont stock. Third, five of Du Pont's directors are also directors of Christiana, and eight of Du Pont's directors own more Christiana stock than Du Pont stock.

On the other hand, both Messrs. McCoy and Shapiro testified that Christiana does not control Du Pont. The draft Proxy Statement states: "Christiana and Du Pont have consistently denied in prior proxy statements and otherwise that Du Pont is controlled by Christiana." (Du Pont Exhibit 5, page 1).

This uncertainty about whether Christiana controls Du Pont affects part of Mr. Shapiro's concern about future directors of Christiana. If Christiana does not control Du Pont, then future Christiana directors' possible lack of understanding of the chemical industry is irrelevant because Christiana cannot force Du Pont to do something it doesn't want to do. Consequently, Christiana's holding of Du Pont stock is not a disadvantage to other Du Pont stockholders.

31

If, however, Christiana *does* control Du Pont, then the future abilities of Christiana directors are of concern to

Du Pont stockholders. This alternative contradicts the testimony of Messrs. McCoy and Shapiro on the question of control.

While there is a lack of clarity as to present control, the record shows considerable clearness as to the potential for control. Both Messrs. McCoy and Shapiro drew attention to the potential that a block of 28.3 percent of Du Pont stock provides. In particular, Mr. Shapiro showed that control of a block of Christiana stock provides access to control of the 28.3 percent block of Du Pont stock. The existence of Christiana provides potential for control of 28.3 percent of Du Pont stock with an investment totalling much less than the cost of buying 28.3 percent of Du Pont directly. Thus Christiana stock provides a possible route to voting control of many more Du Pont shares than an equivalent investment in Du Pont stock would provide. This voting leverage possibility is not possessed by Du Pont stockholders generally, and would be eliminated as a result of the proposed merger.

The value of this voting leverage is analyzed in Morgan Stanley's Report:

"A possible disadvantage to Christiana of a merger would be the loss of any benefits which it may derive from being the largest holder, with approximately 28.3% of the outstanding common stock, of Du Pont. It is difficult to place an economic value upon such benefits. It should be noted, however, that from time to time, blocks of shares representing control of major corporations have been sold or exchanged at premiums above the quoted market value of the shares.

32

Such a transaction might possibly take place in a merger of Christiana into a company other than Du Pont. In the case of Christiana, however, the size of the block, the fact

that it might not, under certain circumstances, represent effective control and the effect of the United States antitrust laws would appear to make such a transaction unlikely." (Applicants' Joint Exhibit 1A, pp. 6-7, Morgan Stanley).

Thus for the control issue to have economic importance, it is necessary to have a potential buyer of Christiana stock who is

a) clear of antitrust complications,

b) capable of raising the substantial funds required, (at April 28, 1972 prices, a minimum investment in fifty percent plus one of Christiana common stock implied a value of $147 times 5,855,052 shares, or 860 million dollars), and

c) able to persuade sufficient Christiana stockholders to sell (contrary to the evidence in the case that Christiana holders have no intention of selling the Du Pont stock to be issued in the proposed merger because they view themselves as long term investors in Christiana or Du Pont).

While the probability of occurrence of all of the foregoing is relatively low, an even lower probability attaches to the possibility that, in addition, the potential buyer plans a course of action detrimental to the other Du Pont stockholders. Yet it is on this low joint probability that the fears expressed by Messrs. Shapiro and McCoy rest.

33

12. Analyze the Estimates of Taxes in a Section 333 Liquidation in Terms of the Discount Applicable to Christiana's Net Asset Value.

Based on May 31, 1972 market prices, Morgan Stanley presents an analysis of the relationship between Christiana's adjusted net asset value in a merger with Du

Pont and its adjusted net asset value in a section 333 liquidation. This is in Division's Exhibit 3, pp. 12-18. It is based on the June 20, 1972 letter from Dechert Price and Rhoads regarding the taxes payable by Christiana stockholders in a section 333 liquidation (Division's Exhibit 2A).

	Merger	*Liquidation*
Asset value before adjustments	$2,316,697,803	$2,316,697,803
less estimated Federal capital gains taxes payable on sale of News-Journal	7,021,168	7,021,168
less estimated expenses and capital gains tax payable on sale of Wilmington Trust shares	661,608	
less expenses of merger or liquidation	1,500,000	400,000
less tax payable by Christiana common stockholders on accumulated earnings and profits		69,513,106
Adjusted net Asset Value	2,307,515,027	2,239,763,529
less Christiana Preferred Stock at $120 in merger and $100 in liquidation	12,780,000	10,650,000
Adjusted Net Asset Value available to Christiana common stockholders	2,294,735,027	2,229,113,529

34

Morgan Stanley concludes that the liquidation is equivalent to a 2.84 percent discount from Adjusted Net Asset Value. This is based on the observation that in a merger, the preferred stock will receive $120 per share, or $12,780,000 in total. When this is added to the amount realizable by the common stockholders from a liquidation,

$2,229,113,529, the total is $2,241,893,529. This last amount is 2.84 percent less than the Adjusted Net Asset Value in a merger, $2,307,515,027.

On July 5, 1972, Dechert Price and Rhoads reported that "it will not be possible to agree upon an earnings and profits figure for Christiana. Furthermore, if all the legal questions discussed were resolved against Christiana, the result would be an earnings and profits figure vastly in excess of $85.8 million." Consequently, the firm advised that a section 333 liquidation was not a viable alternative for Christiana.

Later, Mr. L. E. Grimes testified that the taxes payable by Christiana stockholders could be in the range of two to four hundred million dollars. He qualified these numbers by explaining that they were not the product of discussions with anybody, but were his own thoughts (A. 420). Mr. Shapiro qualified Mr. Grimes' estimate further.

"A. I think if I remember his testimony he said he just reached out into the air and grabbed a number. At least I don't know of any solid factual basis for arriving at a calculation.

Q. Was such a potential figure discussed at all ?

A. Not that I know of.

Q. Not by you?

A. Not by me.

35

Q. Not discussed with you?

A. And not discussed with me." (A 544-545).

Following the format of the tabulation above, if taxes of 200 to 400 million dollars were to result from a section 333 liquidation, they would be the equivalent of an 8.5 percent or 17.2 percent discount respectively from Adjusted Net Asset Value in a merger situation. The calculations follow:

Adjusted Net Asset Value in a Liquidation	$2,239,763,529
Replace original tax estimate by estimate of $200,000,000.	69,513,106+ 200,000,000—
Revised Adjusted Net Asset Value	2,109,276,635
less preferred stock at $100	10,650,000—
Adjusted Net Asset Value available to Christiana common stockholders in a Section 333 liquidation	2,098,626,635
add preferred stock at $120 in a merger	12,780,000+
total	2,111,406,635
compared to Adjusted Net Asset Value in a merger of	2,307,515,027
is the equivalent of a discount of	8.5%
If taxes are increased from $200 to 400 million, then the total (above) declines to	1,911,406,635
which is the equivalent of a discount of	17.2%

36

13. What Was the Valuation of the Christiana Stock, as a Percentage of Net Asset Value, in the Cases of *Paulina du Pont Dean v. Commissioner*, 19 TCM 281 (1960), and *Mary A. B. du Pont, et al., Executors v. Commissioner of Internal Revenue*, 38 US Bd. Tax Appeals 926 (1938)?

13.1 In the Paulina du Pont Dean case, the court applied three cumulative discounts to arrive at the value of common stock of Nemours Corporation. Nemours owned stock in Delaware Realty and Investment Company, which owned stock in Christiana Securities Company, E. I. du Pont de Nemours and Company and Hercules Powder Company. Christiana owned stock in E. I. du Pont de

Nemours and Company, General Motors Corporation, Wilmington Trust Company and the News-Journal Company.

The court valued Christiana at 79.42 percent of net asset value; Delaware Realty at 86 percent of its net asset value; and Nemours at 80 percent of its net asset value, for a cumulative discount of 54.64 percent. The percentages for Delaware Realty and Nemours reflected their earnings, dividends, taxes, and factors relating to the control of Nemours.

For Christiana, the court stated:

". . . we can discern no reason for using any figure as the value of Christiana . . . other than the market or the bid or asked prices . . . The mean between the bid and asked prices of Christiana common reflects a 20.58% discount from net asset value of that security and it is considered unrealistic to assume a liquidation by sale of the assets." (p. 287).

37

13.2 In the Mary A. B. du Pont case, the court valued Christiana at 56.8 percent of net asset value (a 43.2 percent discount). Some of the considerations underlying this conclusion are specified at pages 940-943, and are summarized below.

(1) During 1927, the market price of Du Pont doubled.

(2) In 1927 Du Pont relied heavily on its holding in General Motors for its earnings. In that year, General Motors' earnings reflected the fact that its principal competitor, Ford, was practically out of production.

(3) Christiana could not have sold its Du Pont stock without affecting the market price of Du Pont.

(4) Christiana would have income tax liabilities if it sold its Du Pont stock, so that a shareholder could not receive net asset value as the result of such a sale.

(5) There was no market for Christiana common stock.

38

14. How Has Du Pont Been Affected by the Investment Company Act of 1940?

Because of its affiliation with Christiana, Du Pont is required to file applications for exemption when it proposes to engage in certain kinds of transactions. The SEC stated that its files "show that there have been approximately 50 applications" since 1940 (footnote 41, A. 29). Du Pont's Treasury Division summarized the 15 applications filed in the years 1967-1972 (Division's Exhibit 1, Appendix A, Attachment 3). Thus there appears to have been an increase in such applications in recent years.

Du Pont estimates that the total time spent on 1940 Act matters was "the equivalent of 1½-2 employees on a full-time basis" on the average. Mr. McCoy testified that he hoped the delays caused by the applications had not cost Du Pont any profits (A 610). In three of the last 15 applications, the delay is noted as having been disadvantageous to Du Pont.

On balance, Du Pont has encountered some delays and incurred some costs in complying with the Act. These are small relative to the size of Du Pont.

39

15. Estimate the Amount Realizable by a Hypothetical Christiana Common Stockholder Who Sells Stock on April 28, 1972, or Receives Shares of Du Pont Representing 97.5 Percent or 87.9 Percent of Net Asset Value in a Merger and Sells the Du Pont Shares at April 28, 1972 Prices, Assuming a 35 Percent Capital Gains Tax Rate and a $25 Per Share Cost for Tax Purposes.

	Christiana common stock	*Du Pont common stock for specified percent of net asset value in a merger (a)* 97.5%	87.9%
(1) Sale of stock (b)	$147.00	$188.94	$170.27
(2) less tax cost	25.00	25.00	25.00
(3) capital gain	122.00	163.94	145.27
(4) tax at 35 percent	42.70	57.38	50.84
(5) Amount realizable (1-4)	104.30	131.56	119.43

a. 97.5 percent of net asset value implies an exchange ratio of 1.123 shares of Du Pont per share of Christiana. 87.9 percent implies 1.012 shares (see earlier tabulations).

b. Christiana common at closing bid price April 28, 1972. Du Pont common at closing price of $168.25 on April 28, 1975, times the applicable exchange ratio. No allowance for commissions on sale of stock.

40

16. Evaluate the Advantages and Disadvantages of the Proposed Merger to the Common Stockholders of Christiana and Du Pont, Following the Format of Exhibit 5 of Kidder, Peabody's Report (Assuming Net Asset Value Exchange).

Kidder, Peabody's listing assumes a net asset value exchange. An exchange based on a discount from net asset value is discussed toward the end of this answer.

CHRISTIANA

Advantages

1. "Realization of underlying asset value (32% premium over market)."

Christiana stockholders would not realize asset value in the sense of obtaining cash as a result of the proposed merger. They would receive Du Pont stock equal in value to the asset value. Realizing cash by the sale of Du Pont stock received in a merger would involve transactions costs for all stockholders, and substantial tax liabilities for most stockholders.

2. "Elimination of Federal tax on Du Pont dividends."

3. "Elimination of Christiana operating expenses."

The demise of Christiana would remove both the Federal tax of 7.2 percent on the dividends received by Christiana and Christiana's operating expenses (approximately $300,000 in 1971).

4. "Realize a more liquid listed holding."

Du Pont stock is listed on the New York Stock Exchange whereas Christiana is traded in the over-the-counter market. The average weekly dollar volume of Du Pont stock was 23 times that for Christiana in the first six months of 1972 ($14.3 million for Du Pont compared

41

to $0.6 million for Christiana). Thus the market for Du Pont is more liquid than the market for Christiana.

5. "59% increase in EPS (largely from accounting treatment)."

Dividends paid by Du Pont are the bulk of Christiana's earnings. If Du Pont shares are received by

Christiana stockholders in a merger, then the earnings reported would be those of Du Pont. Because Du Pont retains almost one-third of its earnings, reported earnings per share increase sharply in a proforma comparison with Christiana earnings.

The parenthetical remark implies that this increase is the result of accounting conventions. Such conventions reflect the reality that Christiana and Du Pont are separate companies, and Christiana cannot include the annual undistributed earnings of Du Pont as though they were undistributed earnings of Christiana. However, the earnings per share increase is not a major advantage. This is because the earnings per share increase is unlikely to be accompanied by a similar dividend increase, given Du Pont's long run policy of reinvesting part of its annual earnings in the business.

6. "10% increase in dividends."

Kidder, Peabody assumes that Du Pont maintains its $5.00 per share dividend, although an exchange at net asset value requires the issue of additional shares with a consequent increase in the cash paid out in dividends each year.

42

7. "Elimination of potential conflict of interest situation."

Conflict of interest situations arise whenever Christiana enters negotiations with Du Pont, such as in the present merger situation. However, this item is not discussed in the Kidder, Peabody report. The nearest reference is a brief mention of interlocking directorships and stockholder positions on page 26 of Kidder, Peabody's report. The demise of Christiana would eliminate the interlocking directorships, and the stockholder positions would

all be in Du Pont stock. However, it is difficult to see how the elimination of the directorships and lack of direct holding in Du Pont could be an advantage to Christiana stockholders, because it is through these arrangements that control of Du Pont is possible. Loss of this control is cited as disadvantage number 1. Finally, a merger is not the only way to remove any potential conflict of interest situations.

8. "Participate directly in Du Pont management."

This is true if participation in management means that former Christiana stockholders would be able to vote directly at meetings of Du Pont stockholders. However, there is no reason to anticipate that former Christiana stockholders would play a greater role than now in the daily management of Du Pont.

Disadvantages

1. "Loss of 28% 'control' block of Du Pont stock."

Control is discussed in the answer to question 11, above. The conclusion is that there is a control element in Christiana's holding of Du Pont stock, and the proposed merger would destroy this.

43

2. "59% dilution of net asset value."

This is based on a comparison of two different things, the net asset value of Christiana and the book value of Du Pont. Net asset value of Christiana is based on the market value of its holdings. Book value of Du Pont is based on historic cost. No market value of assets is shown for Du Pont in Kidder, Peabody's Exhibit 3. Consequently, there is no basis in the Exhibit for comparing market value

of holdings on pre-merger and proforma bases. However, Exhibit 3 lists the proforma Christiana book value and net asset value per share as the same, despite their conceptual differences. The 59 percent figure is based on this confusion of concepts.

3. "Minor loss of diversification from newspaper and trust company."

Christiana is a non-diversified investment company, so any diversification provided by the newspaper and the trust company holdings are inconsequential.

4. "Increased estate taxes."

In the cases cited in question 13, various courts have valued Christiana stock at substantial discounts from its net asset value. To the extent that these discounts have been based on a market price for Christiana which is at a discount from net asset value, then this reason will disappear with a merger. There is no evidence in the record of how frequently estate taxes are incurred by Christiana holders, nor of the tax rates applicable. Consequently, this disadvantage cannot be estimated in monetary terms.

44

5. "Expenses of merger."

DU PONT

Advantages

1. "Controlled elimination of 28% 'control' block of stock (Potential market pressure and/or tender offers)."

Dispersal of the votes would be accomplished by a merger. As discussed in the Answer to question 11, such vote dispersal removes the voting leverage inherent in

shares of Christiana and is to the advantage of non-Christiana holders of Du Pont.

The matters in parentheses are more properly listed as a disadvantage to Du Pont. To the extent that a merger results in secondary offerings or block sales of Du Pont, there are likely to be adverse price effects on Du Pont stock. The answers to questions 4 and 7 refer to literature indicating that the adverse price effects of block sales are temporary but that the effects of large and frequent secondaries may be longer-lasting. While Amendment 6 to the Application places restrictions on sales of Du Pont stock receivable in the merger, the extent of market pressure is also contingent on the future motivations of Christiana stockholders. The record indicates that a large proportion of their shares are held with low tax bases, thus inhibiting sales, and reducing the potential for market pressure.

2. "Elimination of affiliate status under the 1940 act."

This minor advantage is discussed in the answer to question 14.

45

3. "28% increase in shares available to public for trading."

Approximately 70 to 75 percent of the Du Pont stock receivable by Christiana stockholders in a merger would be restricted. (see answer to question 7). Only the balance, a 7 to 8.4 percent increase, fits the description of this item, and it is advantageous only so long as it does not generate market pressure, as discussed above under Du Pont advantage number one.

4. "Potential increase in earnings on incremental shares."

This is an advantage to both Christiana and Du Pont. The potential increase in earnings arises from the redeployment of some of Christiana's assets. Depending on the

size of the earnings increase, and the number of additional shares issued in a merger, the effect on Du Pont's earnings per share could be favorable, neutral or unfavorable. Since Christiana stockholders would receive Du Pont shares, they would share in whatever effects were realized.

5. "Accomplishment of an action apparently in the public interest."

If it is assumed that Christiana no longer serves a useful purpose, then the merger eliminates an unnecessary corporation. This is a minor advantage to the shareholders of both companies.

6. "Elimination of potential conflict of interest situation."

See the evaluation of Christiana advantage number 7, above. It is not necessary to have a merger to remove any conflict of interest situations for directors or officers of Du Pont who are directors, officers, or stockholders in Christiana.

46

Disadvantages.

1. "Minor decrease in book value."

See the answer to question 9 on the irrelevancy of book value.

2. "Expenses of the merger."

The foregoing listing of advantages and disadvantages assumed a net asset value exchange. To the extent that the exchange is based on a discount from net asset value, the following effects should be noted.

a. Christiana advantages 1, 5, and 6 would be reduced proportionately.

b. Christiana disadvantage 4 would be diminished proportionately.

c. The disadvantageous aspects of Du Pont advantages 1, 3, and 4 would be diminished proportionately.

The list omits some factors.

a. Christiana advantage: Elimination of any future potential capital gains tax liability by Christiana.

As indicated in the answer to question 10, Mr. Harter testified that "about 29 percent of the total market value of the securities held" by Christiana would be needed to pay the capital gains tax on the appreciation of the securities. As long as Christiana retains the securities, there is no liability under existing law. However, any sale would result in a tax liability to Christiana. A merger would remove this possibility.

b. Christiana advantage: No discount applied to any proceeds of the Christiana claim for a Federal Tax refund.

Under the terms of the proposed merger, the tax claim and

47

related cash reserved for expenses would become the property of Du Pont. Eventually, Du Pont shares approximating either the net proceeds of the claim or its fair value five years after the merger would be distributed to former Christiana common stockholders. This arrangement makes no provision for the application of a discount to this small part of Christiana's assets, and thus is a minor advantage to Christiana.

48

EFFECTS UPON CHRISTIANA COMMON STOCK OF VARIOUS DISCOUNT VALUES AND DIVIDEND POLICIES.*

	Merger at Specified Percentage of Adjusted Net Asset Value (a)			
	100%	*97.5%*	*87.9% (h)*	*76.9% (i)*
Exchange ratio, number of DuPont common for one Christiana (g)	1.152	1.123	1.012	0.884
Earnings per share (b)	$8.42	$8.26	$7.65	$6.91
Percent change from 1971 (c)	+59.5%	+56.4%	+44.9%	+30.9%
Dividends per share, 68.6 percent payout (d, e)	$5.78	$5.67	$5.25	$4.74
Percent change from 1971 (c)	+10.0%	+8.0%	0%	—9.7%
Dividends per share, 74 percent payout (d, e)	$6.23	$6.11	$5.66	$5.12
Percent change from 1971	+18.7%	+16.4%	+7.8%	—2.5%
Premium, April 28, 1972 (f)				
Percent	+31.9%	+28.5%	+15.8%	+21.7%
Total	$548,278,380	$491,208,370	$272,045,010	$20,954,995
Premium, July 17, 1972 (f)				
Percent	+13.1%	+10.3%	—0.6%	—13.2%
Total	$257,634,440	$201,836,500	—$12,442,218	—$257,935,970

* See assumptions on following pages, referenced by letters (a) through (i) on this table.

49

EFFECTS UPON DUPONT COMMON STOCK OF VARIOUS DISCOUNT VALUES AND DIVIDEND POLICIES *

	Merger at Specified Percentage of Adjusted Net Asset Value (a)			
	100%	*97.5%*	*87.9% (h)*	*76.9% (i)*
Earnings per share (b)	$7.31	$7.36	$7.56	$7.82
Percent change from 1971 (c)	—0.3%	+0.4%	+3.1%	+6.7%
Dividends per share, 68.6 percent payout (d, e)	$5.01	$5.05	$5.19	$5.36
Percent change from 1971 (c)	+0.2%	+1.0%	+3.8%	+7.2%
Dividends per share, 74 percent payout (d, e)	$5.41	$5.44	$5.59	$5.79
Percent change from 1971 (c)	+8.2%	+8.8%	+11.8%	+15.8%
Net number of DuPont common to be issued (retired)	110,696	(188,501)	(1,491,108)	(2,983,470)
Market value of net shares (j)				
April 28, 1972	$18,624,602	($31,715,293)	($250,878,920)	($501,968,820)
July 17, 1972	$18,209,492	($31,008,414)	($245,287,260)	($490,780,810)

* See assumptions on following pages, referenced by letters (a) through (j) on this table.

50

Assumptions

A. Adjusted net asset value as shown in DuPont Exhibit No. 5, pp. 6 and 7. Christiana's holding of DuPont common stock is valued at $163.875, the average of the closing prices on the New York Stock Exchange, July 10 through 14, 1972. This value is also used to compute the number of DuPont shares to be issued to preferred and common stockholders of Christiana.

B. Earnings per share are based on net income of DuPont after the merger, calculated at $347.6 million:

Actual 1971 net income earned on common stock		$346,500,000
Earnings of 4.46 percent on Christiana assets to be redeployed by DuPont:		
Wilmington Trust Co. share	$ 2,699,424	
News-Journal Co. share	24,260,000	
Cash, less current liabilities	5,981,367	
Claim for tax refund	11,723,013	
	44,663,804	
Less adjustment for handling tax refund claim	12,723,013	
Less expenses and taxes on sale of assets	7,619,606	
Less merger expenses	1,500,000	
	$22,821,185	1,017,825
Preferred dividends saved by retiring Christiana's holding of 16,256 DuPont preferred shares, 16,256 × $4.50		73,152
		$347,590,977

51

Values of Christiana assets are from DuPont Exhibit No. 5, pp. 4 and 6. The full amount of merger expenses is shown because these reduce the total extra assets available to DuPont. (4.46 percent is shown in Division's Exhibit 12, Exhibit 4—Kidder, Peabody).

C. Percentage changes in earnings and dividends per share are based on Christiana's 1971 earnings per share of $5.28 and dividend per share of $5.25, and DuPont's earnings per share of $7.33 and dividend of $5.00.

D. Payout ratios for DuPont of 68.6 percent and 74 percent are based on data for the previous five years. 68.6 percent is the average of the three lowest ratios; 74 percent approximates the highest ratio.

	1967	*1968*	*1969*	*1970*	*1971*
Payout ratio (%)	74.3	68.8	68.9	72.9	68.2

These data are computed from DuPont Exhibit No. 5, pp. C-3.

E. In these tables, dividends are maintained at specified proportions of earnings. These dividends change as earnings vary with differing discounts.

F. The computation of the premium, or increase in market value of Christiana shares, is based on the closing market price for DuPont and the closing bid price for Christiana on April 28, 1972, the day that merger discussions were announced, and July 17, 1972, the day the proposed merger terms were announced.

52

G. Shown to three decimal places; calculations done with six or more decimal places. Formula for computation:

$$XR = \frac{\frac{[ANAV\ (1\text{-}d)] - 120CP}{DCSP}}{CCS}$$

where ANAV = adjusted net asset value ($2,223,425,827)
CCS = number of shares outstanding of Christiana common stock (11,710,103)
CP = number of shares outstanding of Christiana preferred stock (106,500)
d = discount from adjusted net asset value (stated as a decimal)
DCSP = price of DuPont common stock ($163.875)
XR = exchange ratio (number of DuPont common for one Christiana).

H. 87.9 percent is shown because this is the percentage at which the dividend to Christiana common stock is the same before and after the merger.

I. 76.9 percent is shown because it portrays the effect of a 23.1 percent discount. This was the discount on April 28, 1972, based on mean market price and net asset value of Christiana (see Applicants' Joint Exhibit 1B, Exhibit 9—Morgan Stanley).

J. The market value of the net shares of DuPont to be issued or retired is computed using the closing market value for DuPont on April 28, 1972 and July 17, 1972.

OPINIONS OF THE COURT BELOW.

The majority and dissenting opinions of the Court of Appeals for the Eighth Circuit, entered January 23, 1976, are not reprinted here. They appear at page 44a of the Appendix to the Petition for a Writ of Certiorari filed on behalf of the Securities and Exchange Commission, June 26, 1976, in No. 75-1872.

JUDGMENT OF THE COURT BELOW.

The Judgment of the Court of Appeals for the Eighth Circuit, entered January 23, 1976, and the Order of the Court of Appeals, entered February 26, 1976, denying, by an equally divided court, petitions for rehearing with suggestions for rehearing en banc are not reprinted here. They appear at pages 109a and 111a of the Appendix to the Petition for a Writ of Certiorari filed on behalf of the Securities and Exchange Commission, June 26, 1976, in No. 75-1872.

SUPREME COURT OF THE UNITED STATES

—

No. 75-1870.

—

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,

Petitioners,

v.

RICHARD J. COLLINS, JR., ET AL.

ORDER ALLOWING CERTIORARI.

Filed October 4, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is consolidated with No. 75-1872 and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

—

No. 75-1872.

—

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

RICHARD J. COLLINS, JR., ET AL.

———

ORDER ALLOWING CERTIORARI.

Filed October 4, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is consolidated with No. 75-1870 and a total of one hour is allotted for oral argument.

Supreme Court, U. S.
FILED
JUL 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1870
E I. DU PONT DE NEMOURS AND COMPANY and
CHRISTIANA SECURITIES COMPANY,
Petitioners,
v.
RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

No. 75-1872
SECURITIES AND EXCHANGE COMMISSION,
Petitioner,
v.
RICHARD J. COLLINS, JR., et al.,
Respondents.

BRIEF FOR RESPONDENT
Richard J. Collins, Jr., in Opposition

RICHARD J. COLLINS, JR.
314 North Broadway
St. Louis, Missouri 63102
(314) 241-5845
Attorney Pro se

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Foreword	1
Question Presented	2
Statement of the Case	2
Reasons for Opposing the Writ	5
I. The Commission's approval was based on irrational grounds	5
II. The market value of Christiana's own stock is relevant in setting the merger terms	12
III. Persons have a right to be paid for helping others out of their tax problems	13
IV. The focal point of the Court of Appeals decision was the administrative record	14
V. The non-Christiana stockholders were inadequately represented in the deal	15
Conclusion	16
Appendix	A-1
Memorandum of Christiana Securities Company and E. I. Du Pont De Nemours and Company in opposition to requests for hearing	A-1
Introduction	A-2
Order	A-4

Table of Cases Cited

Camp v. Pitts, 411 U.S. 138, 142 15

Federal Power Commission v. Transcontinental Gas Pipe Line Corp., — U.S. —, 46 L.Ed. 2d 533 15

International Radio Telegraph Co. v. Atlantic Communication Co., 290 F 698 9

La Buy v. Howes Leather Co., 352 U.S. 249 (1957) 15

Mary A. B. Du Pont et al., Executors v. Commissioner of Internal Revenue, 38 Bd. Tax Appeals 926 (1938) 11

Niagra Hudson Power Corp. v. Leventritt, 340 U.S. 336 (1951) 12, 13, 14

Paulina Du Pont Dean v. Commissioner, 19 TCM281 (1960) 11

S.E.C. v. Chenery Corp., 318 U.S. 80 5

S.E.C. v. Chenery Corp., 332 U.S. 194, 209 5

Miscellaneous Cited

15 U.S.C. 80a 7, 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1870

E I. DU PONT DE NEMOURS AND COMPANY and CHRISTIANA SECURITIES COMPANY,
Petitioners,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

RICHARD J. COLLINS, JR., et al.,
Respondents.

BRIEF FOR RESPONDENT

Richard J. Collins, Jr., in Opposition

Respondent, Richard J. Collins, Jr., respectfully submits that the Petitions for a Writ of Certiorari filed in this case should be denied.

The opinion below, the basis of this Court's jurisdiction, and several of the statutory provisions involved are set out in the two petitions for a writ of certiorari and the Appendix to the

petition filed by the Securities and Exchange Commission (SEC Petition).

"App." refers to the appendix to the SEC petition, "C.A. App." refers to the joint appendix in the Court of Appeals, and "Collins App." refers to the appendix attached hereto.

QUESTION PRESENTED

The question presented is whether the Commission, in approving a proposed merger of an investment company into its controlled operating company should value the investment company essentially on the basis of the market value of its assets as well as the substantially lower market value of its own outstanding stock.

STATEMENT OF THE CASE

Christiana was created by its own stockholders or predecessors in order to control Du Pont. (App. 1a-3a). The other stockholders of Du Pont did not create it.

Both Christiana and Du Pont consistently deny that Christiana controls Du Pont. (C.A. App. 220, 461-462, 577-578, 607-608, 680).

The two negotiators for the DuPont Company were Messrs. Charles B. McCoy and Irving S. Shapiro. Mr. Shapiro did not own any Christiana stock, and in order to avoid any ripple Mr. McCoy gave his entire holding of 40 shares of Christiana to his grandchildren. (C.A. App. 574, 719)

Christiana, having been organized in 1915, had held its bloc of Du Pont stock during the entire business careers of Messrs. McCoy and Shapiro at Du Pont. (C.A. App. 421-424, 572-574; App. 1a).

Mr. McCoy's aggregate remuneration for the preceding year from the DuPont Company had been $272,600.00, and Mr. Shapiro had received $193,913.00 (C.A. App. 719)

After allowing for the gift by Mr. McCoy of his 40 shares Christiana, the Board of Directors of DuPont as a group owned 417,624 shares DuPont and 606,867 shares Christiana. (C.A. App. 719)

The Du Pont officers told its financial advisor, First Boston Corporation, that the big advantage to Du Pont would be freeing it from certain restrictions imposed by the Investment Company Act, which had impeded and delayed business decisions in the past. (C.A. App. 676, 677).

At the Commission's hearing, these same men had a different version and testified that the big advantage of the merger to the Du Pont Company would be the dispersal of the bloc of Du Pont held by Christiana, claiming so long as the bloc remained intact it was a potential threat in the future. (C.A. App. 452, 453, 576, 577).

As to the Investment Company Act's purported restrictions on Du Pont, its Chairman testified that little or no profits had been lost. (C.A. App. 609, 610). The Commission itself found there was no significant advantage to Du Pont in freeing it from the Act's requirements. (App. 20a).

The Commission also found there was no significant advantage to Du Pont in the dispersal of the bloc of stock held by Christiana (App. 18a, 19a).

On or about October 4, 1972, the Chairman of Du Pont, with an attached covering letter, sent to each of his stockholders a copy of the six-page Commission notice which described the proposed terms of the merger. (C.A. App. 846). His letter to his stockholders specifically said that they were not required to do anything at the present time. But at the end of the six page

notice from the Commission, which was enclosed with his letter, there was the statement that if anyone wished a hearing on the matter, he or she had to give written notice to the Commission by October 27, 1972. (C.A. App. A. 11f).

From the 225,000 Du Pont and 8,000 Christiana stockholders, the SEC received 15 responses of which five contained a request for a hearing. (Page 1 of the memorandum of Christiana and Du Pont in opposition to requests for a hearing. (Collins App. A-1).

The Manufacturers Hanover Trust Company had not sent a copy of the SEC notice to any of its co-fiduciaries because it believed the notice did not require any shareholder action. (C.A. App. 847-848).

Three Du Pont shareholders participated at the hearing and two of them are now before this court (App. 10a).

The Commission in summary found there was ". . . the striking disparity between the substantial benefits to be received by Christiana and the far more modest ones inuring to Du Pont." (App. 35a).

The Commission found that in economic reality Christiana stock was already Du Pont stock, and that the merger was an exchange of equivalents. (App. 9a). It also found that taxes take 7.2% of Christiana's earnings. (App. 11a).

The Court appointed Professor Upson to answer various questions, and in its Order appointing him as consultant expressly directed the Professor not to advise on the fairness or reasonableness of the terms. (Collins App. A-4). Du Pont and Christiana in their comments on the Professor's report stated that it did not in any respect contravene the evidence in the record before the Commission or the considered judgment of the Commission in rendering its decision. They did, however, repeat their objections to his appointment. (Collins App. A-2-3).

REASONS FOR OPPOSING THE WRIT

The Commission's approval of the merger is based on the idea that as a matter of law net asset value alone is the measure of fairness. If the grounds upon which the Commission's holding represent sound reasoning, the writ should be granted. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 209. But if the grounds for the approval cannot be sustained, then the writ should be denied. *S.E.C. v. Chenery Corp.*, 318 U.S. 80.

The Commission's petition for the writ contains conflicting statements.

First, in Commission's request for a one day extension to file its petition, the SEC states that Respondent asked that the merger terms reflect the full 23% discount that was the market value of Christiana. But it also states that Respondent urged that the merger terms be such as would reflect not more than one-half of the discount. (SEC Petition 10).

Second, on page 9 of the Commission's Petition, it states that the Court of Appeals held that the major criterion is the market value of Christiana's stock rather than its net asset value, but on page 8 it gives the correct holding of the Court that substantial weight has to be given to both the market value and net asset value of Christiana.

I

The Commission's Approval Was Based on Irrational Grounds.

The Court of Appeals properly rejected the Commission's use of only net asset value because it was based on irrational thinking shown by the six reasons given by the Commission for its holding. They are as follows:

1. The Court of Appeals method (substantial weight to both net asset value and market value) would cause serious problems in administering the Act (SEC Petition, page 10).

2. Net asset value alone furthers the important policy of eliminating unnecessary corporate holding companies (SEC Petition, page 11).

3. The underlying policy of the law is to protect shareholders of investment companies from loss caused by overreaching by affiliates, therefore, Du Pont may not bargain as though it were not affiliated with Christiana. (SEC Petition, pages 12, 13 and 17; App. 24a-25a).

4. The proposed transaction is the exchange of equivalents (App. 9a).

5. Anything other than net asset value would strip Christiana stockholders of their intrinsic value (SEC Petition, page 7 and 8; App. 33a).

6. The law prevents a closed end company from selling its stock below its current net asset value (note 8 on pages 18 and 19 of SEC Petition).

These six reasons are irrational.

First, the net asset method used by the Commission is all very simple as shown by the Commission. (App. 9a-10a). And it is true the method set by the Court requires more skill and judgment, but after all, what are the members of the Commission? Are they experts in the securities field, or are they mathematical clerks who can only say that if Christiana owns so many shares of Du Pont then each share of Christiana should be exchanged for so many shares of Du Pont—a problem to be solved by someone who knows his long division. Experts are supposed to tackle difficult problems—problems where informed judgment is required.

Du Pont and Christiana favor this simple arithmatical approach as shown by the fact that they filed a Memorandum with the Commission opposing a hearing on this merger.

Second, and perhaps the most glaring example of irrational thinking, is the belief that the net asset value exchange ratio will work to eliminate unnecessary holding companies.

As the Commission found, Christiana was organized to control Du Pont. The organizers in placing their Du Pont stock in Christiana could look forward to have the value of Christiana stock perform in several ways in relation to the value of the Du Pont stock.

a) There was the possibility of Christiana being worth a premium over that of the Du Pont stock due to the control element. Control stock, other things being equal, is more valuable than non-control stock. Such a situation would be all this and heaven too—nothing could be better than control plus an increase in market value of their own holdings at no cost to themselves.

b) There was the possibility that it would simply sell at par with Du Pont—this situation would be merely heaven, achieving control at no cost to themselves.

c) There was the possibility that it would sell at a discount below Du Pont—a situation somewhere this side of paradise, having the advantages of control with the disadvantages of lower dividends and individual net worth.

Christiana and Du Pont will deny before this Court that Christiana controls Du Pont, but the law itself and common sense will refute this denial. The law says that ownership of more than 25% of Du Pont creates presumption of control unless the Commission finds otherwise. Section 2(a) (9) of the Act—15 U.S.C. 80a-2(a) (9). The Commission has not found

otherwise. Aside from the law, with 28% of the stock held by Christiana, and the remaining held by over 225,000 persons, what reasonable doubt can there be about control?

The important points are that Christiana was created by the free acts of its own original stockholders—it was not created by other stockholders of Du Pont who became subservient stockholders in relation to Christiana—and the Christiana holders could look forward to the possibility that their own stock would command a premium plus the certainty that they would be in control of Du Pont. This gave Christiana shareholders the control not only of their own funds but also the command of the investment of the other Du Pont holders who are now being told that fairness requires that the Christiana holders be returned to their original position at little or no cost.

If the non-Christiana holders had put Christiana in its present position, there would be equitable grounds for saying that they must help Christiana. But Christiana's problems are its own making—and it was created with the sole purpose of dominating the other Du Pont shareholders.

If, as the Commission holds, it is important public policy to eliminate unnecessary holding companies, would Congress write a law guaranteeing that any time the stockholders of the controlling holding company become disenchanted with their position that they can initiate a merger with their controlled operating company and get back their original stock without cost?

This net asset value theory of the Commission is either an insurance policy or an escape hatch for holding companies in control of other corporations which, instead of discouraging holding companies, actually encourages them.

This net asset value theory of fairness allows the organizers of controlling holding companies to say: "Heads I win, tails you lose."

The controlling stockholder Christiana is overreaching its subservient fellow stockholders by receiving $450 million from a deal where the subservient receive $55.6 million—a ratio of 8 to 1. (SEC petition 5).

Third, the Commission reasons that the underlying policy of the law is to protect shareholders of investment companies from overreaching by the affiliated corporation.

Our frame of reference in this matter is that the law clearly states that Christiana is in control of Du Pont. Did Congress pass a law to protect the party who is in the control position from being overreached by the party it controls? The Investment Company Act does not mandate the dissolution of Christiana. Therefore, if Christiana does not like the terms proposed by Du Pont, it, as the controlling stockholder, can freely walk away from the deal. If any party needs protection, it is the party who is in the subservient position rather than in the controlling position.

The Commission in holding that the proposed terms are fair, and yet that but for the affiliation Du Pont may have had better terms, is going against both law and generally accepted standards. The law as to fairness of contracts between controlling and controlled corporations in that the measure of fairness is whether their terms would appeal to non-affiliated corporations. *International Radio Telegraph Co. v. Atlantic Communication Co.*, 290 F 698.

The Commission reasons as the underlying policy of the law is to protect shareholders of investment companies that Du Pont may not bargain for better terms. It readily admits that had there been no affiliation, Du Pont may have done so. (App. 24(a)).

Despite the fact that in form this is a statutory merger of two corporations, in reality it is a deal between the control-

ling stockholder and the subservient stockholders of the same corporation.

For over 50 years Christiana has controlled the other Du Pont holders—at this time, they should be allowed to bargain as an equal with Christiana.

The Commission justifies its decision by a meaningless platitude, "Some transactions are more important to one side than to the other. This one is of that type." (App. 20(a)).

Respondent states that the basic object of this merger, stripped of all the rhetoric, is to make money for stockholders. And money is just as important to the 225,000 Du Pont stockholders as to the 8,000 Christiana stockholders.

Fourth, the Commission is wrong in saying that the transaction is the exchange of equivalents.

The Commission reasons that as each share of Christiana has a net asset value of 1.15 shares of Du Pont, each Christiana share is the economic equivalent of 1.15 shares of Du Pont.

The fallacy of this view is that for two stocks to be economically equivalent, there must be a standard of measure. No one can say that two things are the same without a standard of reference. In the economic field, the standard is money.

A five dollar bill is the economic equivalent of fifty dimes; one English pound sterling is the economic equivalent of $1.75 only when it can be exchanged for $1.75; one share of Du Pont is the economic equivalent of $160.00 only so long as it is bought and sold for $160.00. And finally, so long as Christiana is selling at a discount from its net asset value it is not the economic equivalent of its net asset value.

Because of income taxes of 7.5%, Christiana can pay only 92½ cents for each $1.00 of Du Pont dividend received by it.

To hold that a stock paying 92½ cents dividend is the economic equivalent of one paying $1.00 dividend is clear error.

Fifth, a merger on other terms than net asset values should not be prohibited because, as the Commission holds, it would strip the Christiana holder of the intrinsic value of his holding.

If the Christiana holders had paid the full price for the intrinsic value of their holding, or if the non-Christiana holders themselves were responsible for Christiana's situation, there might be some merit in this argument.

Therefore, the Court should consider how the present holders of Christiana acquired their stock. As the original holders (who with their desire to control their fellow stockholders in Du Pont created Christiana) may be presumed to be dead (Du Pont-Christiana Petition, page 15), there are only three ways—by inheritance, by gift, or by purchase.

If he acquired the stock by inheritance, he paid less estate taxes than had he received Du Pont stock. *Mary A. B. Du Pont et al., Executors v. Commissioner of Internal Revenue*, 38 Bd. Tax Appeals 926 (1938).

If it was a gift, the same thing can be said as far as the gift tax. *Paulina Du Pont Dean v. Commissioner*, 19 TCM281 (1960).

If he bought the stock, it would have been at a discount, and by the Commission's standards, he robbed the previous owner of his intrinsic value. If it is wrong for non-Christiana holders to take away the intrinsic value, certainly the person who bought it on the market was committing a wrong—perhaps an even greater wrong depending on the discount.

The Commission, in talking about the evil of stripping Christiana holders of their intrinsic value, is saying that there is a double standard of justice depending upon who benefits from

the discount—if the Christiana holder benefits by paying lower taxes, or by purchasing in the open market it is fine—but for the other Du Pont holders who have been controlled by Christiana for over 50 years to take advantage of the discount it is all wrong.

Sixth, the Commission cites Section 23(b) (15 U.S.C., 80a-23(b)), which says that Christiana may not sell its stock at below net asset value.

The fact of the matter is that the Christiana corporation itself is not selling its own stock. This provision of the law is to prevent transactions such as Christiana selling some of its own stock to a party at less than net asset value and then continuing on in business. With a net asset value of 1.15 shares of Du Pont, and Du Pont selling at $100 per share, its net asset value would be $115 per share. Were it to sell a new share for less than $115 cash or 1.15 shares Du Pont, obviously the existing stockholders would be damaged. The market value of their stock would have to fall.

But here in reality Christiana is not selling its own stock—what is happening is through the merger the Christiana stockholder is surrendering so many shares of Christiana worth so much money and receiving so many Du Pont shares worth so much money. Now, as long as he receives something worth more than he surrenders, he is not injured; on the contrary, he is benefited.

II

The Market Value of Christiana's Own Stock Is Relevant in Setting the Merger Terms.

The Du Pont-Christiana petition cites Niagra Hudson Power Corp. v. Leventritt, 340 U.S. 336 (1951) as authority for claiming the market value of Christiana is irrelevant.

Respondent answers that had Christiana been selling at a 23% premium rather than a 23% discount they would be claiming that market value is very relevant indeed.

The *Niagra Hudson* case is out of place in this case. There it was shown that there was no reasonable hope that warrants would be exercised and hence they had no claim on the corporation assets despite their market value. Market value of the warrants had no meaning to the corporation or its business because there was little or no chance that they would be exercised.

But the market value of Christiana has meaning. Here are two parties under no legal compulsion to make a deal, and the market value clearly sets the lowest terms which Christiana would take just as the net asset value sets the highest terms it could reasonably expect. Christiana holders are not going to take less than they can get in the open market. Therefore, as market value here is one limit to the bargaining range, it has to be considered.

III

Persons Have a Right to Be Paid for Helping Others Out of Their Tax Problems.

A tax dollar is the same as any other dollar. If one can give another person a savings in taxes or in operating expense, or anything else, he should be compensated all the same. The saying by Judge Learned Hand to the effect that people are entitled to arrange their affairs so as to save taxes is all very true. But neither Judge Hand nor anyone else, with the exception of the Commission and the two corporations here, ever said that the taxpayer is entitled, *free of charge*, to have someone else cooperate in helping him save his taxes.

Furthermore, Du Pont and Christiana say that the reasoning behind the Court's opinion is that it used the term "Du Pont

family" as equivalent to "Christiana stockholder," and in their footnote state that Christiana is no longer a family enterprise. (Du Pont-Christiana Petition, 14-15).

This is contradictory to the Commission's finding—namely, "Christiana remains in overwhelming measure a Du Pont family affair." (App. 4(a)). With 75% of its stock held by the family, Du Pont and Christiana nevertheless are telling this Court it is no longer a family enterprise.

Section 42(a) of the Investment Company Act, 15 U.S.C. § 80a-42(a) provides in pertinent part: . . . "The findings of the Commission as to the fact, if supported by substantial evidence, shall be conclusive."

As to their complaint that the Court did not sufficiently identify the advantages that went with the control of Du Pont (Du Pont-Christiana petition 15), Respondent answers that only Rip Van Winkle would question them. The Commission in its opinion noted some well known facts of economic history. (App. 1a-3a; 20a, note 42).

To question that there are advantages in control of "one of the world's greatest industrial complexes" (App. 1a) is either playing games or woeful ignorance. Respondent would add that in addition to the Du Pont Company itself, the control also extended to General Motors Corporation for over 40 years until this Court ordered the divestiture.

IV

The Focal Point of the Court of Appeals Decision Was the Administrative Record.

The Court of Appeals in appointing the Professor as a consultant specifically directed that he was not to advise as to the fairness of the merger terms. (Collins App. A-4).

Such action was drastically different than that by the Judge in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), where he turned the case over to a Master with directions to report back on the facts and conclusions of law. In that case the Trial Judge practically turned the whole hearing over to the Master and was rightfully accused of abdication of the judicial function. That is in no way comparable with a direction not to advise as to the fairness of the merger terms.

This Court in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, — U.S. —, 46 L.Ed. 2d 533, quoted from *Camp v. Pitts*, 411 U.S. 138, 142, saying "The focal point for judicial review should be the administrative record already in existence, not some new record initially made in the reviewing court."

The term "focal point" means principal focus, and to say that the Court of Appeals here turned its principal focus away from the administrative record to the professor's report is simply not in line with the facts.

A thorough reading of the Court of Appeals decision clearly shows that the focal point for the decision was the administrative record.

V

The Non-Christiana Stockholders Were Inadequately Represented in the Deal.

First, Messrs. McCoy and Shapiro during the negotiations told their financial advisor, First Boston, one story and at the hearing told the Commission another story about the big advantage to Du Pont. The Commission found that neither story contained an advantage—worth a continental to Du Pont.

Second, Mr. McCoy's letter to his stockholders contained a serious error in telling them no action was required. Action indeed was required, if anyone wanted a hearing. The fact that only 15 replies were received from 225,000 stockholders is substantial evidence that the stockholders were misinformed.

The Commission declared that there was ". . . the striking disparity between the substantial benefits to be received by Christiana and the far more modest ones inuring to Du Pont." (App. 35a). The sole purpose of the prohibition against overreaching is to prevent a striking disparity between the benefits received by the two parties. What else can a striking disparity in benefits be than a case of over-reaching?

Being allowed to pool stock, form a controlling holding company, and then having the right by law to bail out at little or no cost, is unfair and overreaching the subservient stockholders.

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be denied.

RICHARD J. COLLINS, JR.
314 North Broadway
St. Louis, Missouri 63102
(314) 241-5845
Attorney Pro Se

APPENDIX

MEMORANDUM OF CHRISTIANA SECURITIES COMPANY AND E.I. DU PONT DE NEMOURS AND COMPANY IN OPPOSITION TO REQUESTS FOR HEARING

Christiana Securities Company ("Christiana") and E.I. du Pont de Nemours and Company ("Du Pont") have filed a joint application under Sections 17 and 6(c) and Rule 17d-1 of the Investment Company Act of 1940 for Commission approval of a merger of Christiana into Du Pont. Christiana's principal asset is a block of Du Pont Common Stock comprising 28.3% of the stock outstanding. The merger terms provide for the issuance of Du Pont Common Stock in exchange for Christiana Common Stock on the basis of a 2½% discount from Christiana's adjusted net asset value, as more fully explained in the application, and issuance of Du Pont Common Stock with market value of $120, equivalent to the redemption price of the Christiana Preferred Stock, in exchange for each share of such stock. A Notice of Application was issued by the Commission on October 3, 1972, and the period for filing requests for hearing expired October 27, 1972. Pursuant to an understanding with the Staff, Christiana and Du Pont sent a copy of the Notice of Application to the approximately 8,000 Christiana stockholders and 225,000 Du Pont stockholders. Fifteen responses were filed with the Commission, of which five contained a request for hearing.

INTRODUCTION

Pursuant to the order of this Court dated October 9, 1975 and the communication from the Clerk dated December 12, 1975, Intervenors, E. E. du Pont de Nemours and Company ("Du Pont") and Christiana Securities Company ("Christiana"), submit their comments on the Report of Roger B. Upson. Intervenors' comments will be directed principally to those portions of the Report that bear on the two main issues before the Court. In Intervenors' view these issues are: (1) Should the Court sustain the determination of the Securities and Exchange Commission ("Commission") that the terms of the proposed merger of Du Pont and Christiana, which reflect the net asset value rather than the market value of Christiana stock, are fair and reasonable and do not reflect overreaching on the part of anyone, notwithstanding that the financial benefits to the Christiana stockholders will exceed those accruing to the Du Pont stockholders as a result of the merger; and (2) Should the Commission's determination be rejected on the ground that consummation of the merger would precipitate such a substantial volume of selling as to have an adverse impact on the market value of Du Pont stock to the disadvantage of all Du Pont stockholders. These comments will treat other aspects of the Report only to the extent that clarification or amplification appears necessary.

The Report of Professor Upson does not in any respect contravene the evidence in the record before the Commission or the considered judgment of the Commission in rendering its decision. To the extent, however, that he has departed from the record, while Intervenors will comment on his observations, they repeat the objections first raised in response to the Court's

initial suggestion which preceded Professor Upson's engagement. The record fully supports the Commission's determination in this case.[1]

---

[1] This Court, in Arthur Murray, Inc. v. Oliver, 364 F.2d 28 (8th Cir. 1966), criticized the practice of adding evidence to the record outside the normal judicial process.

> "[F]rom the very nature of the judicial role, it is not given to a judge to engage in a prospecting quest for other evidence . . . to add to a record, nor counterpartly to appoint a master to make such a discovery pursuit for him. . . ." 364 F.2d at 34.

Likewise, in Baker v. Simmons Co., 325 F.2d 580 (1st Cir. 1963), the First Circuit overturned the use by a special master of an accountant to aid him in analyzing the record after it was closed, pointing out that the objecting party "now finds itself bound by whatever the accountant told the Master, without opportunity to cross-examine either as to his qualifications, his methodology, and the extent of his examination of the books or of his understanding thereof, or as to his actual conclusions" 325 F.2d 583. The Supreme Court has unequivocally cautioned against resort to *ad hoc* non-judicial assistance, particularly in complex matters. La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

Under the relevant provisions of the Investment Company Act, it is the responsibility of the Commission rather than this Court to take additional evidence if such evidence is required. 15 U.S.C. § 80a-42(a).

ORDER

Before: Heaney, Stephenson, Circuit Judges,
Smith, Senior District Judge

Professor Roger B. Upson, Associate Dean of the University of Minnesota College of Business Administration, has been appointed by this Court as a contract consultant in the office of the Circuit Executive for the United States Court of Appeals for the Eighth Circuit. Professor Upson will assist the Court in understanding the record made in the above entitled case by the Securities and Exchange Commission, and will prepare reports and memoranda for the Court in connection with that function. His duties will not include giving opinions as to the fairness and reasonableness of the merger.

Reports made to the Court by Professor Upson will be filed with the Clerk of Court and copies of the reports will be furnished by the Court to counsel for the parties. The parties will be given an opportunity to respond to reports submitted by Professor Upson by filing with the Clerk of this Court a response thereto within five (5) days after the receipt of the report from the Clerk of Court.

The parties will not be required to bear the expenses incurred by the Court in retaining Professor Upson.

Dated: October 9, 1975.

Supreme Court, U. S.
FILED
JUL 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-1870, 75-1872

E. I. du PONT de NEMOURS AND COMPANY AND
CHRISTIANA SECURITIES COMPANY,
Petitioners,

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

vs.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
TRUSTEE,
Respondents.

BRIEF OF RESPONDENT LEWIS C. MURTAUGH, TRUSTEE, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

LEWIS C. MURTAUGH,
TIMOTHY J. MURTAUGH III,
111 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorneys for Lewis C. Murtaugh, Trustee.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

	PAGE
Opinion Below	1
Question Presented	1
Statute Involved	2
Statement of the Case	2
Reasons for Not Granting the Writ:	
1. Certiorari Should Not Be Granted Because the Question Presented, As Set Forth by the Petitioners, Distorts the Facts in This Case, the Applicable Law, and the Basis of the Opinion of the Court Below	3
2. The Case Presents No Special Or Important Questions and No Purpose Could Be Served by Remanding	8
3. Certiorari Should Be Denied Because the Commission's Ruling Is Not Based on Established Principle and Strains and, in Fact, Ignores Part of the Law It Interprets	10
4. The Market Price of Christiana Is Its Investment Value and a Sharing by DuPont in the Increment of Close to a Half Billion Dollars Is Not Sharing in Christiana's Tax Savings As Contended by Petitioners As a Basis for Certiorari	13
5. Certiorari Should Be Denied Because This Case Is Poorly Suited to Enable the Court to Establish Any Basic Principle Rationalizing Law or Economics	17
6. Certiorari Is Not Warranted Since the Court's Finding of Probably Market Impact As a Detriment Is Strengthened and Made a *Fortiori* by Several Considerations	18
7. Company Detriments From Market Impact	22
Conclusion	24
Appendix—I, II, III	A1-A7

CITATIONS.

Cases.

Birdman v. Electro-Catheter Corporation (E. D. Pa. 1973), CCH Fed. Sec. Law Rep. Section 93, 934 24

Blue Chip Stamp v. Manor Drug Stores, 95 S. Ct. Rep. 1917 (June 9, 1975) 23

Harriman, et al. v. E. I. duPont deNemours and Co., et al., (D. Del., Dec. 23, 1976), 411 F. Supp. 133 .....13, A6, 7

Pepper v. Litton (1939), 308 U. S. 295, 306-7 6

Securities and Exchange Commission v. Chenery Corp., 332 U. S. 194 (1939) 4

United States v. DuPont, 177 F. Supp. 1 (N. D. Ill. 1959) 21

United States v. National Association of Securities Dealers, 95 S. Ct. 2427 (1975) 13

Willheim v. Murchison, 342 F. 2d 33, 43 (2CCA) c. d., 382 U. S. 840 (1965) 12

OTHER AUTHORITIES.

Boudreaux, Kenneth J., *"Discounts and Premiums on Closed-End Mutual Funds"* (May, 1973, 28 Journal of Finance 515-522 15

Brudney and Chirelstein, *"Fair Shares in Corporate Mergers and Takeovers"*, 88 Harvard Law Review 297 (December, 1974) 6, 11

Business Week (June 28, 1976), p. 86 .....15, 16

Business Week (July 29, 1976), p. 54 22

Fleischer, Mundheim & Murphy, *"An Initial Inquiry into the Responsibility to Disclose Market Information"*, 121 U. of Pa. Law Review 798 22

Jaffe, *"Judicial Control of Administrative Action"* (p. 576 et seq. *"The Correct Relation of Expertness to the Scope of Review* 12

Kripke, Homer, *"A Search for a Meaningful Securities Disclosure Policy"*, Vol. 31, The Business Lawyer 293, 305-12 (ABA, 1975) 17, 18

Longbien & Posner, *"Market Funds and Trust Investment Law"*, Volume 1976, No. 1, American Bar Foundation Research Journal, page 1 6

Wall Street Journal, *"Shenandoah Oil Ends Merger Talks with DuPont"*, July 12, 1976, p. 6..... 22

Statutes and Rules.

Investment Company Act of 1940:
15 U. S. C. § 80a-1 23
15 U. S. C. § 80a-1(a)(3) 2, 4, 5
15 U. S. C. § 80a-17(a) 5
15 U. S. C. § 80a-17(b)(1) 12, 13, 23, 25
15 U. S. C. § 22(d) 11
15 U. S. C. § 80a-42 (Section 43 of Oct) 9

Public Utility Holding Company Act of 1935
15 U. S. C. § 79 4

Securities Exchange Act of 1934
15 U. S. C. § 78j(b) (Section 10(b)) 23

Rule 10b-5 Issued Under 1934 Act 23

U. S. Sup. Ct. Rule 19, 28 U. S. C. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

Nos. 75-1870, 75-1872

E. I. du PONT de NEMOURS AND COMPANY AND
CHRISTIANA SECURITIES COMPANY,
Petitioners,

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

vs.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
TRUSTEE,
Respondents.

BRIEF OF RESPONDENT LEWIS C. MURTAUGH, TRUSTEE, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

OPINION BELOW.

The Opinion of the Eighth Circuit Court of Appeals Is Now Found at 532 F. 2nd 584.

QUESTION PRESENTED.

Has the Investment Company Act of 1940 created a safe haven as a matter of law so that a closed end Investment Company which has a fiduciary relationship with and controls an affiliated company can force a merger without allowing the

controlled company to share in vast benefits and increments its forced consent makes possible?

STATUTE INVOLVED.

In addition to the portions of the Investment Company Act of 1940 (15 USC § 80a-1 *et seq.*) set forth in the SEC Appendix (App. 113a-116a) and in the DuPont and Christiana Petition (pages 2-4), the following provisions of the Investment Company Act of 1940 are pertinent:

> "§ 80a-1.
>
> (a) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 79z-4 of this title, and facts otherwise disclosed and ascertained, it is found that investment companies are affected with a national public interest in that, among other things—
>
> * * * * *
>
> (3) such companies customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce;
>
> * * * * *

STATEMENT OF THE CASE.

The majority Opinion's Statement of Underlying Facts (App. 45a), not objected to in the dissenting Opinion, is sufficient for this Respondent's purposes. This Respondent, a holder, as trustee, of 400 shares of DuPont, is more fully described below as Trustee for Emmanuel and Helen Steib, under Declaration of Trust dated 8/30/56. Nothing seems to be gained by insisting on the full description.

REASONS WHY THE WRITS SHOULD BE DENIED.

1. Certiorari Should Not Be Granted Because the Question Presented, as Set Forth by the Petitioners, Distorts the Facts in This Case, the Applicable Law, and the Basis of the Opinion of the Court Below.

The "Question Presented", as stated in the Petition of the Securities & Exchange Commission (hereafter described as SEC Petition), is deficient. It is phrased as follows:

> "The question presented is whether the Commission in approving a proposed merger of an investment company into an affiliated operating company, properly valued the investment company *essentially* on the basis of the market value of its assets *rather than* on the basis reflecting the substantially lower market value of its own outstanding stock." (Emphasis Supplied). (The same "rather than" dichotomy appears in SEC Petition 4 and 10).

If the stated question had stopped just before the "rather than" and had substituted "exclusively" for essentially, it would have been acceptable, even though it obscures the fact that the Commission's Opinion is based on its interpretation of the statute as a matter of law and is not a finding on a matter of evidence.

The DuPont-Christiana Petition, hereafter referred to as the D-C Petition, in its version of the "Question Presented" describes the disposition by the Court below as "substituting its own views for the judgment of the Commission in securities valuation, fairness, overreaching and protection of investors". Evidently the merging parties long for the safe harbor of a ruling based on evidence, but that is not what the Commission's Opinion is based upon. (App. 42a f. 5, 6 and text)

The D-C Petition though not stating in its "Question Presented" that the question was whether the market price of Christiana rather than the net asset value of its holdings should control, nevertheless, *unremittingly* argues that the market price

of Christiana was *the* chosen alternative by the Court below *rather than* the net value. The following quotations, all from the D-C Petition, will demonstrate that this is so. (All emphasis supplied).

Page 7—*"rather than"*

Page 9—heading *"Rather than"*

Page 10—"choice *between* market price and net asset value"

Page 11—"Its error was in assuming that the market price of Christiana common stock was *the* appropriate measure . . ."

Page 12—The Court of Appeals insisted that the terms *reflect* the market value of Christiana stock . . ."

Page 12 Footnote—"its conclusion that the market value of Christiana stock should *control* the merger terms. . ."

One of the objectives with respect to mergers set forth in the SEC report as related to the 1940 Act which was emphasized in the Opinion of the Court below (App. 59a) was to restore to mergers the standard of an arms length bargaining result which under conditions of common control was improbable in practice as state court decisions had developed. Chenery II (*SEC v. Chenery*, 332 U. S. 194 (1947) was an example of a ruling sustaining an even higher standard of fiduciary conduct under the Public Utility Holding Company Act of 1935 than the common law required, a situation where no detriment resulted but a fiduciary profited. It is a misbegotten citation when used to support lowering standards relating to fiduciary profiting and self-dealing. The Commission's Opinion, in effect, licenses closed-end investment companies which control affiliates to negotiate mergers for their own exclusive benefit. As the Court pointed out (App. 54a, f. 13), Section 1(a)(3) of the 1940 Act specifically indicates that the Act was directed to

prevent abuses in this situation. The SEC Petition finally winds up by saying "the Commission's interpretation effectuates the underlying policy of Section 17 to protect shareholders of investment companies from overreaching by affiliates" (page 17), but obviously Section 17(a), which prohibits transactions, is designed to protect all parties, and Section 17(b)(1) clearly has the same design, countering the particular abuse pin-pointed in Section 80a-1(a)(3) (p. 2 *supra* see also App. 54a f. 13).

Moreover, the whole idea of Christiana needing protection is absurd. By common consent the Commission and the Court below find that Christiana is in control of this situation. They cannot be forced into a merger on any terms to which they do not agree. The unreality of the argument that DuPont can possibly overreach Christiana is apparent. The only possible overreaching is that which can be done by a person in control who exercises that control to his own exclusive advantage. DuPont is in no position to overreach.

The Eighth Circuit Opinion (hereafter described as the Court Opinion) did not attempt to *substitute* the market value of Christiana shares *for* the *market value* of Christiana assets (more properly styled net asset value). The SEC Petition repeats this erroneous generalization with reference to the objectors position (page 6), though it reduces it later to the objectors seeking not all but a substantial share of the merger's increment. The Court's Opinion did insist on the necessity of taking Christiana share market value *as a factor* into account, *as well as its net asset value* (App. 54a, 56a, 57a, 58a, 61(a), 62a, 65a, 68a, 71a, 72a), and also took into account the market impact created by the increase of the floating supply of DuPont shares from 34,000,000 to 47.500.000 by reason of the release of pragmatically impounded DuPont shares held by Christiana, and the inevitable consequential increase in sales, especially and obviously by Wilmington Trust Company, strangling from lack of diversification in its over a billion dollars in illiquid Christiana shares

in fiduciary accounts (App. 88a, 89a, 90a).[1] The Court further refused to accept the Commission's concept that the merger terms were reasonable and fair as to DuPont because no detriment was incurred by DuPont or its shareholders (an assumption, by the way, that this Respondent denies and deals with later). The Court Opinion states "Lack of detriment is, like net asset value, just one factor to be considered in determining the reasonableness and fairness of a merger" (App. 72a, f. 22). The lack of benefit to DuPont, rather than an alleged lack of detriment, is certainly a reason for not entering into the proposed merger. Mergers are associated with some conceived benefit or increment to both merging parties.[2] That this concept should be utterly eschewed in this fiduciary context as a matter of law in favor of a controlling fiduciary is certainly regressive. The concept that a merger which is controlled on both sides, by one side, which automatically triggers fiduciary standards, can be so structured that the increment and other benefit from the merger goes entirely to the controller violates the principles set forth in *Pepper* v. *Litton* (1939), 308 U. S. 295, 306-307, relied on in the Court Opinion (App. 61a). This opinion, requiring terms such as would result from arm's length bargaining, is undoubtedly one of the most frequently cited in the whole area of fiduciary responsibilities in every context (in the 1943-1971 Shepard Citator there are over seven columns of citations). In *"Fair Shares In Corporate Mergers And Takeovers"*, Brudney and Chirelstein, 88 Harvard Law Review 297 (December, 1974), the authors strongly challenge the validity of a result in which the controlling side in a merger receives post-merger benefits

1. On trust diversification imperatives, see "Market Funds and Trust Investment Law", Langbein and Posner, Volume 1976, No. 1, American Bar Foundation Research Journal, page 1, at pages 3-21.

2. A comprehensive compilation of economic and legal considerations in connection with mergers generally is found in 88 Harvard Law Review 308, Footnote 33, in the article mentioned later in this section.

while the controlled side has to be content with having only pre-merger status (p. 311). The authors point out that no sharing in incremental values of the merger results in this situation, which is a violation of fiduciary principles.[3]

The Commission rejected all evidence as irrelevant, as the Court Opinion precisely noted in its forthright Section II (App. 51a). This evidentiary matter rejected included the expert reports and testimony introduced by the applicants (App. 17a, f. 38) and evidence introduced by the SEC staff and this Respondent (CA App. Index V and VI) and that attempted to be introduced by this Respondent (App. 41a, 42a, also f. 5 and 6 on 42a).

As the Court ruled (App. 51a, 53a, 54a), the Commission's issuance of an exemption in this context cannot be based solely on a ruling as a matter of law, but on evidence. The Court said, "The Section (17(b)) does not *limit* the considerations relevant to the approval of a merger to the preservation of the net asset value of the investment company" (App. 54a) (emphasis supplied). This is not to say that net asset value is not a factor as suggested by the SEC Petition's "Question Presented", and as is reiterated throughout the D-C Petition, but just that it is not, as a matter of law, an exclusive factor. In several other places in the Court's Opinion the Court makes it clear that it, in turn, is not creating a competing rule of law but is rejecting the rule of law stated in the Commission's Opinion which excludes all evidence (App. 54a, 68a, 86a, 90a).

A further criticism of the statement of the SEC "Question Presented" is the use of the term "market value of its assets" to upgrade, by suggestion, a dollar figure, the correct term for which is "net asset value". Net asset value is merely a figure obtained by multiplying any number of DuPont shares

3. The fact that the authors illustrate their point with a larger controller merging its controlled subsidiary into it does not detract from their theme that a fiduciary power center should not take all the increment from a merger.

held by any investment company (from one to thirteen and a half million here) by the current market *price*, not value, of its underlying assets. Christiana's accountants know better. See the numerous caveats in the proxy statement Exhibit (CA App. 715, 7, 8), pertinent parts of which, for the convenience of the Court, are in the Appendix to this Brief.[4] The point on the misuse of "market value" is rather thoroughly gone into in the Shapiro cross-examination (CA App. 474-81).

2. The Case Presents No Special or Important Questions and No Purpose Could Be Served by Remanding.

This case presents no apt occasion for granting certiorari within the principles set forth in Rule 19 of this Court (Considerations governing review on certiorari). Arguably, it might be different if the Circuit Court of Appeals had upheld the Commission's exemption order. In that event, to paraphrase the closing sentence of this Respondent's eleven-page Request for Hearing of October 25, 1972 (CA App. 90k), "The shareholders of DuPont, fixed in a web of interlocking directorates in probably the most obvious (and colossal, in terms of dollars) conflict of interest posture in corporate, legal and financial experience since the securities industry first came under mature control" could legitimately argue that this Court should review the matter. A half billion dollar enrichment of insiders in a merger in which they transfer control by way of relinquishment, and control both sides of the merger, is one which could legitimately call for close scrutiny at every court level. Since the Eighth Circuit has acted to prevent this peculiarly specific transaction, there seems to be no obvious reason for certiorari. DuPont and Christiana, after the Commission had (over their vigorous protests) granted a Request for Hearing of the now

4. This Respondent regrets belaboring the point as to the "Question Presented", and alleged equivalences, but casuistical extensions of sophistical assumptions are the kernels of these and several other argued difficulties in this matter.

Respondents, chose to execute an agreement to merger (CA App. 698). The Commission, therefore, had before it, and the Eighth Circuit also had before it, a single question, namely, whether the agreement authorized by the directors of the two companies should be granted an exemption or not. Neither the Commission nor the Court was in any position to do anything but vote this particular agreement up or down. The Applicants for Exemption did not apply for instructions or guidance, nor ask the Commission to make a determination as to what was a fair ratio, if the agreement in question was not fair, nor a motion to send the matter back for additional evidence as Section 43 provides. This is unlike many administrative proceedings, such as a rate-making proceeding or many court proceedings, such as a condemnation or even a public utility-holding company determination, where the Commission has to make the decision and can alter a proposal before it.

Assuming that the net asset value does not preempt all other considerations and that the market price of Christiana should have been taken into account, as well as the tremendous benefit of increased marketability, the tax free advantages which DuPont's consent affords, and weighing in the detriments, it is perfectly obvious that no finding based on the evidence would justify a ratio of 42-1 in benefits just considering the investment appreciation factor. In Appendix B to this Brief there is shown material which appeared on a single page of this Respondent's Appellate Court Brief (page 65), which sums up all the benefits and detriments in this merger. All of this is immaterial, apparently, if net asset value is to govern, but if any of them, including the "striking disparity" (App. 35a) are taken into account, the 2½% discount from net asset value, which was designed as a sort of catch penny inducement for shareholder votes (CA App. 457, 460, 585, 587) cannot possibly balance this situation. In other words, it would be impossible for the Commission to find as a matter of evidence that this transaction, *including the consideration to be paid and*

received, was reasonable and fair and not overreaching. Therefore, there is no occasion to remand the matter for further action by the Commission so far as this particular merger on these particular terms are concerned. This does not slam the door on another merger upon fairer terms, if Chistiana should want it. DuPont having consented to the present terms and being controlled, with its management anxious to seize the reins would obviously approve.

3. Certiorari Should Be Denied Because the Commission's Ruling Is Not Based on Established Principle and Strains and, in Fact, Ignores Part of the Law It Interprets.

The Opinion of the Court (App. 61a-67a) was convincing in rebutting the assertion that the Commission had established any rule or principle of law in any prior ruling, similar to the governing rule stated in this case, that the net asset value of a closed end investment company must be honored against all other factors. If this were so, a simple quotation would suffice to establish the rule's existence. Certainly the attorneys of record here for DuPont have top experience in this field and their "Factors to be Considered" letter of instruction (CA App. 768-774) is devastating to the present analysis by the petitioners of past Commission rulings. The most telling part of the "Factors" letter for this respondent's instant purpose is the portion quoted in Footnote 12 of the Court's Opinion (App. 53a) which includes, among other elements, market values and net asset values as factors in the Commission's rulings. The single most important sentence for our purpose is the closing sentence quoted in the Opinion Footnote, "No single factor has been considered determinative". Here the Commission's Opinion definitely does consider, as a matter of law, that the single factor of net asset value is determinative. In the "Factors" letter, the attorneys merely claimed that "the SEC has held net asset value relevant in valuing investment companies . . .", (CA App. 771) not conclusive. In the *Delaware Realty* case referred to in the "Factors" letter (CA App. 770), where the SEC accepted net asset value as a basis for a merger, the "Factors" letter said, "The rationale for this was that the parties to the merger had alternative means of recognizing net asset value without significant tax effect (1)". The footnote said, "Other similar cases considered by the SEC have involved little or no discount but have not expressed a specific rationale for this approach". The letter goes on to say that Christiana is taking the position that a Section 333 liquidation under the Internal Revenue Code is an alternative whereby it "presumably could achieve, with relatively little taxation, a liquidation in which its DuPont securities would be distributed directly to its shareholders" (CA App. 770). The following paragraph instructed the advisors "the report should indicate whether, on the assumption that the 30 day liquidation provisions would operate to Christiana's benefit here, du Pont would be justified in giving little weight to the market value of Christiana in the merger negotiations."

Apparently even students of the law find that not only is there no rule or principle as to net asset value controlling in a merger such as this which must pass scrutiny under Section 17(b) but actually find that some "cases suggest that fairness requires a sharing of the gains resulting from the merger", (*Fair Share In Corporate Mergers And Takeovers*, Brudney and Chirelstein, 88 Harvard Law Review 297, 310, 1974). In a footnote to the quoted statement the following appears:

> "The sharing requirement is sometimes found in opinions of the Securities and Exchange Commission dealing with the fairness of mergers under the Investment Company Act, 15 U. S. C. § 80a (1970). LaSalle St. Capital Corp., SEC Investment Company Act Release No. 6693 (Aug. 23, 1971); Talley Indus. Inc., SEC Investment Company Act Release No. 5953, (1969-1970 Transfer Binder) CCH Fed. Sec. L. Rep. ¶ 77,774 (Jan. 9, 1970); Townsend Corp. of America, SEC Investment Company Act

Release No. 4045, at 35-39 (Sept. 2, 1964); Atlas Corp., SEC Investment Company Act Release No. 2920 (Oct. 19, 1949). Compare Burco Inc., 15 S. E. C. 828, 832-33 (1944), with Iowa Interests Corp., 40 S. E. C. 927 (1961)."

Facing up to the fact that its analysis of prior Commission rulings may not serve as an adequate precedent for the legal ruling made by the Commission in this matter, the D-C Petition, on page 10, argues that even if this is a case of first impression, the Court should abjure its jurisdiction under Section 43 of the Act "to affirm, modify, or set aside such order in whole or in part" as regards matters of law. This is well trod turf and too little supported to justify a considered rebuttal at this stage beyond the treatment it received in the Court's Opinion (App. 73a, f. 25). Reference might also be made to "Judicial Control of Administrative Action". Jaffe (p. 576 et seq. "The correct relation of expertness to the scope of review").

However, there is a provision in Section 17(b), (1) constantly omitted in the Petitions and the SEC Opinion, which strongly militates against the Commission's ruling as a matter of law. The Commission, in its findings (App. 36a, 37a), does not find that the terms of the transaction, *"including the consideration to be paid or received . . ."* (Emphasis Supplied), which qualify the remaining factors to be considered. (Both Petitions similarly ignore this statutory factor). On the contrary, on analysis, the Commission's Opinion finds this very element lacking. The Opinion states "the questions presented are substantial and troublesome. This is not an easy case" (App. 17a). Later in the Opinion the Commission states, "This is not an easy case . . . Its difficulties . . . flow . . . from the *striking disparity between* the substantial benefits to be received by Christiana and the far more modest ones inuring to DuPont" (App. 37a) (Emphasis Supplied). As stated in *Willheim* v. *Murchison,* 342 F. 2d 33, 43 (2CCA) c.d., 382

U. S. 840 (1965), the 1940 Act was drawn with a great deal of specificity and should not be given a construction that strains its plain meaning (cited in App. 53a). The SEC, as amicus, supported the straining (and losing) side's interpretation.[5] No amount of expertise can overcome the dictates of a statute or remedy an administrative excess of a statutory warrant. One of the specifics under Section 17(b)(1) was that the Commission, *as a matter of law*, had to take into account "the consideration to be paid or received". Had due consideration been given to this, the Commission might not have created law which specifically sanctions, as a matter of law, a striking disparity of dollar increments and other benefits. See Appendix II attached hereto where the relative benefits and detriments are tabulated.[6]

4. The Market Price of Christiana is its Investment Value and a Sharing by DuPont in the Increment of Close to a Half Billion Dollars Is not Sharing in Christiana's Tax Savings As Contended by Petitioners As a Basis for Certiorari.

The discount from net asset value at which Christiana sold does not *result from* the tax burden on Christiana (SEC Petition 4, 7; D-C Petition 11), and the SEC Opinion never said it did, although it did state that avoiding certain taxes was an advantage to Christiana (App. 11a). The statement on page 4 of the SEC Petition that, apparently, the discount of 7.2% of the dividends received by Christiana from DuPont, which

5. See also the recent case of *United States* v. *National Association of Securities Dealers* (1975) 95 S. Ct. 2427, where the court rejected (Page 2439) a decision below (emphasis supplied) *"reflecting an expansive view* of Section 22(d)" of the 1940 Act, although the decision below served the statutory purpose of protecting the net asset value of open-end investment fund shares.

6. The D-C petition refers to the case of *Harriman* v. *DuPont,* 411 F. Supp. 133, and includes a 4-page quotation from it in an Appendix. To preserve the unity of this brief, we comment on this case in Appendix III. The court below referred to this case in footnote 18 (App. 66a) and footnote 23 (App. 72a).

resulted from the intercorporate dividend tax, was one of the elements (of a total of two) responsible for the discount from Christiana's net asset value does not stand analysis. On the announcement date, April 28, 1976, that consideration was being given to a merger, DuPont was selling at 168.25 and Christiana was selling at 147, although it held 1.15 shares of DuPont for each share of Christiana outstanding. Christiana was distributing to its shareholders its post-income tax dividend, about half the 15% dividend excess over that which a share of DuPont received. How, in all reason, could a 7½% *higher* dividend explain a $21.25 lower price, just on a share for share comparison, of one share of DuPont versus one share of Christiana, forgetting that Christiana had 1.15 shares of DuPont for each share outstanding? The SEC Opinion recognized this and paused to speculate as to why the price of Christiana shares wasn't 7% higher than DuPont, in view of its net yield in that amount over the yield for DuPont shares (App. 12a, 23a, f. 44).

The *only* other apparent cause for the market discount from net asset value of Christiana shares which the SEC Petition relies upon to furnish a completion of the explanation of the discount was the unrealized appreciation on Christiana's DuPont stock over its carrying value on Christiana's books (SEC Petition 4) which would be subject to capital gain tax if Christiana sold. This is likewise no reason for the discount which would be wider if this was a potential. Right off, a 30% capital gain tax applies to corporations. Christiana would not only have suffered a capital gains tax, but its shareholders would have ordinary income tax were Christiana to pay out the net proceeds. The discount in this situation should have been 50% to 70%. The utter improbability of Christiana selling its DuPont shares was such that this factor could not and did not at all explain the discount from net asset value.

The D-C Petition attempts at page 11 to add the capital gain tax in the event Christiana assets were distributed in a taxable

liquidation as a factor in explaining the price. This factor has no logical connection with the market discount as it did not affect purchasers, except affirmatively. The SEC Petition rightly ignored it. (On the other hand, the D-C Petition does allow a thin trading market as a factor in the discount. This is what the accountants keep warning about (See Appendix I).[7]

The fact of the matter, as the Commission's Opinion notes, is that "Christiana, like most closed-end investment company issues, has long tended to sell at a discount from net asset or liquidation value" (App. 5a). The Court Opinion (App. 86a and 87a), in recognizing the factor of the intercorporate dividend tax and unrealized capital gain tax as merely "affecting", not explaining, the market price of Christiana, merely stated that this was not a reason to ignore Christiana's market value. In Footnote 36 (App. 87a), the Court affirms the Commission's statement, above quoted, as to the endemic nature of the closed-end discount from the net asset value of closed-end funds' portfolios. It cites, among other authorities, *"Discounts and Premiums on Closed-End Mutual Funds; a Study in Valuation"* by Kenneth J. Boudreaux (May, 1973, 28 Journal of Finance 515-522). That author states categorically, "the market price of a close-end fund can fairly confidently be considered to represent the best estimate of the funds true value at each point in time" (p. 521). A thorough reading of the Boudreaux article does not disclose that the author assigns the reason for *any* part of the closed-end funds market discounts from net asset values to tax considerations.

In a recent issue of "Business Week" (June 28, 1976), at page 86, there is an article about a proposal to establish regular payouts from closed-end mutual funds, invading principal if necessary, in an attempt to encourage investors who at present rely on just the income of the funds. There was some

7. (But see the Business Week quotation, *infra*, page 16, as to multi-million dollar closed end funds widely traded on the NYSE and selling at large discounts from net asset value).

difference of opinion in the mutual fund industry as to such a proposal. The article says:

> "But the doubters are watching closely to see whether the prospect of large, regular distributions will reduce the large discounts from net asset value at which almost all closed-end funds usually sell.
>
> Nobody really knows why these funds do sell at such substantial discounts. For example, the $640 million Tri-Continental Corp. and $470 million Lehman Corp., the two largest, are both trading at the moment on the New York Stock Exchange at around 26% below net asset value. The Assn. of Closed-End Investment Companies has funded a study at the Wharton School of the University of Pennsylvania to discover the reasons, but advance reports suggest it may be inconclusive."

The testimony of Charles Townsend of Morgan Stanley to the same effect is set forth in the Court's Opinion (App. 57a, f. 14). Edward Townsend of the First Corporation was even more emphatic (CA App. 319) that the net asset value of Christiana shares was no index of its value, but that Christiana's price was its value. Later he reiterated that Christiana shareholders were not holding DuPont shares underpriced and that Christiana shares were not underpriced (CA App. 332). Even Mr. Shapiro testified to the same effect (CA App. 481).

The argument for a sharing in the benefits of this "consensual" transaction is not a disguised plea for sharing in tax benefits. In fact, it implies in one sense that Christiana shareholders, while reaching for the near half billion dollar benefit for the exclusive enjoyment of its shareholders, will fall short to the extent that the market is depressed by the increase of nearly 40% in the floating supply of DuPont shares above the 34,000,000 of DuPont shares now floating. Christiana shareholders will be richly rewarded in principal and income increment and marketability in any event despite market impact but there will be no compensating features to the detriment suffered by the other DuPont shareholders. Christiana shareholders will get the theoretical increment of close to a half billion dollars minus the market detriment from the increase in the floating supply brought to market. DuPont shareholders who sell will get their pre-merger price minus the currently effective market detriment. Allowing for this is not sharing at all. It is only an adjustment to preserve the status of DuPont shareholders relative to the floating supply before the merger, the barest requirement of justice and fairness, when DuPont and its shareholders must consent.

5. Certiorari Should Be Denied Because This Case Is Poorly Suited to Enable the Court to Establish Any Basic Principle Rationalizing Law or Economics.

The SEC Petition rushes in "where angels fear to tread" by its universal generalization that the discount from net asset value results from two tax factors, as above discussed. This furnishes a q. e. d. to the following statement:

> "When one reads the economic literature, one realizes almost at once that there is a hiatus between the SEC's pretensions as to what it is accomplishing and the economists' appraisal of what the SEC is accomplishing. The economists almost totally ignore the SEC, treating it like some imperfection in a communication system, like some static. Its role is obviously not of fundamental importance to their thinking."

This paragraph is from the first page of an article by Professor Homer Kripke in Volume 31, The Business Lawyer, 293 (ABA, 1975). After giving importance to the article by denominating it a "Bicentennial Paper", the following statement appears:

> "The Editors of The Business Lawyer are pleased to present, as a Bicentennial contribution, a seminal article by a distinguished author which examines both with candor and with an eye to the future an important aspect of corporation law."

The author more modestly entitles his study as "A Search for a Meaningful Securities Disclosure Policy".

With respect to granting certiorari, the Court may consider that this may not be the ideal case for this Court to rationalize a detente, if not a rapprochment, with economists, graduate market scholars and econometricians. For one thing, this Respondent has had no scholastic economic education, and though he has gleaned much information in the last four years, the result has been mainly to gain respect for horizons of which the law has barely become aware or worked out a coherent concordance, or even accomodation, in principle.

Some dimensions of the interdisciplinary condition can be grasped from Section III of Professor Kripke's study, entitled "Some Aspects of the Economics of the Securities Market", Kripke, *supra,* at 305-12.

Obviously the Eighth Circuit, searching for illumination as far as the true situation could be discovered by a rounded analysis, as opposed to a preemptive legal ruling, sought purely professional assistance in the economic field. There is no more occasion to criticize the Court for this than for this Respondent to apologize for referring to the Kripke article. Moreover, a close reading of both Petitions discloses no reference to any part of the Opinion, or to Dean Upson's report, to which they object. At its strongest, this is merely an example of injury without damage and hardly warrants certiorari.

6. Certiorari Is Not Warranted Since the Court's Finding of Probable Market Impact as a Detriment Is Strengthened and Made a Fortiori by Several Considerations.

The D-C Petition (Page 16, f. 8) incorrectly predicates error in the Court finding of market impact as a factor to be taken into account. The Commission's Opinion expressly agreed with this Respondent that increased supply would, all other things being equal, lower prices (App. 27a). It simply refused to go

into the matter (App. 26a). The Commission did state that lower prices would attract the attention of buyers (App. 29a) but it refused to have the record enlarged to provide an understanding of how many sellers might be involved, and taxed this Respondent for not producing a schedule. As the Court Opinion noted, the burden was on the Commission (App. 54a, 51a, f. 8). This Respondent attempted to make more evident the probabilities of market impact, but the Commission stated that this was pointless and irrelevant (App. 36a, 42a). The Commission finally cut the knot by stating the net asset value concept overcame any possible market impact detriment (App. 32a-33a) and, as stated, finally held as a matter of law that market impact was irrelevant. Naturally the Court below wanted some orientation on this subject, and utilization of Dean Upson was just to keep the Court, in its Opinion to be written, from uttering some gauche generalization in a field in which it had little background. The SEC's position was that background wasn't necessary since it had decided the issues as a matter of law.

Bolstering the foundation of the Court's Opinion's finding of error in the Commission's failing to give any weight to the factor of occasional detriment to DuPont shareholders (App. 90a) is the fact that the Court Opinion erroneously assumes that "the merger agreement, however, provides that once a year an underwritten offering of $25,000,000 in the then current market value of such shares can be made. At the average price of $165.00 in the first 6 months of 1972 this would approximate 153,000 shares" (App. 90a, f. 38). The Court Opinion's error in regard to secondaries is twofold; the first, and least important, is that the merger agreement is not the instrument which refers to underwritten offerings that reference is found in the agreement regarding registration (CA App. 836-8) which was considered after the agreement to merge in principle had been made in July of 1972. Disclosure of its terms in general was made by the introduction into evidence of the then current draft of the

registration agreement by this Respondent as Murtaugh Exhibit 15 (CA App. 833). The second, and more significant, error in the Court's Opinion (App. 90a, f. 38), but one which only fortifies its conclusion, is that the reference to the underwritten offerings of $25,000,000 once a year is not correctly stated to be the floor but the ceiling for such underwritten offerings. In other words, the registration agreement provision is that the underwritten offering shall not be less than $25,000,000 (CA App. 837), but it can be as much more as the former Christiana shareholders choose to demand. In fact, DuPont is required to notify other shareholders having registration rights so they may add on (CA App. 837).

A further point supportive of the Court Opinion is the fact that DuPont has no power to refuse to register its shares for underwritten secondary offerings annually (CA App. 837) unless it would interfere with its current financing (CA App. 838). The reason secondary offerings can sometimes be effected with surprisingly short term adverse market effects is that the company can exercise its best judgment as to when, in its interest and the interest of its shareholders, the adverse effects will be offset by other factors (CA App. 198). With the discretion solely in the hands of individual Christiana shareholders as to where their best interests lie, the potential for damage is greatly increased and the remaining shareholders of DuPont are hostages to fortune.[8]

8. On direct examination Charles Townsend of Morgan Stanley testified on the basis of an assumption of 10% of DuPont Company stock, 4.7 million shares, being marketed over a period of five years. As to the time span of periodic market effects following successive issues, he testified (CA App. 199) "It would be difficult to tell. Maybe a month, maybe two months, maybe even three months, *depending on the market conditions at the time*, the way in which the underwriting has been done. We would not want to recommend that sellers of du Pont stock *overtax the market at any particular time*, and *the size of the issue would have to be gauged accordingly*". (Emphasis supplied) Neither Morgan Stanley nor DuPont have any controlling thing to say about the *size* of an issue, or whether it would overtax the market at any particular time

(Continued on next page)

Of course, the size of the issue and its market impact, which might be well called minimal if limited to 153,000 shares, as the Court assumed, cannot be so judged when it may be limitless, beyond DuPont's control, and must be above 153,000 shares. There is no limit, except in the disparate selling shareholders discretion to prevent overtaxing the market, which DuPont's Morgan Stanley witness warned against (CA App. 199). Furthermore, the Court Opinion is fortified by the consideration that the effect of repeated secondaries is naturally cumulative. This was strongly argued to the Commission and the record made by DuPont and Christiana in the General Motors divestiture case (*U. S.* v. *DuPont*, 177 F. Supp. 1 (N. D. Ill. 1959) was that sales of .7% a year over a 10 year period, which sales were postponable in bad years, and assuming that there was no adverse tax effect, would cause a continuous market depreciation of 10 to 15% in General Motors share prices. The Commission's opinion referring rather genially to the D-C assertedly contrary contentions in the General Motors case (CA App. 33a, f. 59) relies solely on the income tax burden under then existing law which might impel selling to pay taxes, a factor not present here, but the evidence in the record here was the D-C evidence, *assuming* pending tax relief measures were enacted, so that only the market impact of the continuous selling of 7% in .7% instalments of General Motors serially over a period of 10 years, postponable in bad years, was the key point, entirely neglected in the Commission's opinion and, in fact, overlooked in the Court's Opinion, but fully explored in the transcript and in the exhibits (CA App. 507-11, 793, 796d, 796e). (No contention has been made there would be endless waves or mindless torrents of selling. This could drive DuPont down 50%. A rational

(Continued from preceding page)

under the Registration Agreement (CA App. 836-8). Therefore, the assumptions in the witness' testimony as to detrimental market effects based on postulated good market conditions or a limited size of the issue and a gauging based on any DuPont Company interest as against the seller's view of their own best interest is fanciful.

balance could easily keep the discount at or near 10-15% as D-C contended). This Respondent, of course, strongly supports the Court Opinion in this case and submits that the point made in this and the next section of this brief merely bolsters the conclusion that "it follows that the Commission erred in failing to give any weight to the factor of an occasional detriment to DuPont shareholders" (App. 90a).

7. Company Detriments From Market Impact[9]

Two circumstances of possible detriment affecting the assets and earning power of DuPont itself should be mentioned and were pressed both in this Respondent's brief to the Commission and to the Court below. The first is that a depression in the price of DuPont stock might interfere with the use of its stock in acquisitions, or might require it to issue more shares than it otherwise would. See the article "Shenandoah Oil Ends Merger Talks with DuPont", Wall Street Journal, July 12, 1976, p. 6. See also Business Week item in July 29, 1976 issue, p. 54. The lowered price of DuPont apparently aborted this acquisition by stock when Shenandoah sought a larger number of shares than previously agreed to, is a lost opportunity affecting all DuPont shareholders, *including long term investors*. Companies with adequate information and good judgment are liable to be wary of a stock being acquired which has a large block selling or secondary overhang situation and certainly will want to renegotiate if the shares they expect to get drop in price. A second detriment to the company might be interfering with its equity financing. Though the registration agreement excuses

9. The distinction between market information which has no effect on a company's assets or earning power, and company information which does, is made and elaborated on in the first respect in *"An Initial Inquiry into the Responsibility to Disclose Market Information"*, Fleischer, Mundheim & Murphy, 121 U. of Pa. Law Review 798. The SEC Opinion asserts no company detriments and no contrary contention (App. 28a). The D-C Petition points this out (page 14). This section contradicts this statement.

DuPont from registering underwritten secondaries in any year in which, in the opinion of DuPont's investment bankers, such offering would interfere with the then current financing plans of DuPont (CA App. 838), this doesn't prevent before and, prospectively, after market effects from secondaries which may interfere with current financing. Furthermore, the additional requirement for registering shares twice a year for disposition other than in underwritten secondaries (App. 856), cannot be valued other than negatively in terms of active new floating supply. Additionally, as stated in a recent Supreme Court case, the tremendous growth of federal security law litigation which, of course, frequently involves asserted misrepresentations or omissions, of which DuPont may serve as a guarantor, the nuisance suit feature so often found, and (with reasonably grounded, or nuisance suits) discovery rights ancillary to securities litigation which may be collaterally very detrimental to a company. This case, *Blue Chip Stamp* v. *Manor Drug Stores* (June 9, 1975) 95 S. Ct. Rep. 1917, turned in part on these circumstances.[10]

Reflection on the matter emphasized in this late case draws attention to the fact that the constant registration statements

10. The remaining part was a reversal of an SEC supported construction of the 1934 Act. During the recently closed and previous term of this Court, several Opinions have been rendered, and certiorari has been granted in other cases, bringing into question the validity or scope of certain provisions of or interpretations of Section 10(b) of the Securities and Exchange Act of 1934 (15 U. S. C. § 78j) and Rule 10b-5 issued thereunder. One unsettled issue seems to revolve around whether Section 10(b) which does not use the word "fair", deals only with misrepresentations, concealment, manipulation or fraud, and whether, without these factors, fairness is an issue. These very current developments have nothing to do with this case, where fairness is a statutory prerequisite under Section 17(b)(1) of the 1940 Act. The Commission's Opinion recognizes a Federal fairness standard has been stipulated, formulated in large measure because of the inadequacies of state law (App. 19a). The Court Opinion convincingly agrees, quoting from the legislative history (App. 58a-61a). Legislative history is uniquely incorporated by reference in Section 1 of the 1940 Act (15 U. S. C. § 80(a)1).

may give rise to shareholder suits in connection with current or prior registration statements because the circumstances of an upcoming registration by insiders was not disclosed (See *Birdman* v. *Electro-Catheter Corporation* (E. D. Pa. 1973) CCH Fed. Sec. Law Rep. Section 93, 934, dealing with the failure to disclose potential market impact on a contemplated sale of share by insiders.) Wilmington Trust Company with 56% of the new stock, and many interlocking directors of DuPont, with all sorts of company and marketing information, and possibly conflicting duties as trustee, is an insider *par excellence*. To avoid danger constant warning about possible registrations beyond DuPont's control will certainly be market depressants inimical to the interests of the company and all of its shareholders.[11]

CONCLUSION.

In an era of great sensitivity to conflicts of interest and fiduciary responsibility, it is interesting to note that the Commission's Opinion never once mentions either term (except in footnote 36, App. 15a, where it refers to Wilmington Trust Company's fiduciary responsibility as to its trusts). Because a fiduciary relationship is so patent is no reason to ignore it.

Typically, a gross enrichment of a fiduciary in a self-dealing transaction is a badge of a breach of a fiduciary obligation with-

11. It is clear from the Opinion of the court below (App. 51a, 52a ff. 8, 9) that the Memorandum Opinion of the Commission denying the "Supplemental Petition of Lewis C. Murtaugh for Rehearing, Including Motion for Leave to Adduce Additional Evidence", which Memorandum Opinion is found at pages 40a-43a in the Appendix, was an important factor in clarifying the Commission's position that a rule of law was involved which made immaterial any evidence as to market impact or intentions to sell or probability of sales and also of evidence on any aspect was relevant. To grasp the scope of the denial of the Motion, it would be helpful to read the rather extensive Supplemental Petition and Motion of this respondent which is found in the Court of Appeals Appendix at pages 131-143. Additionally, of course, this constitutes a rather complete analysis and criticism of the Commission's Opinion filed about five weeks after it was rendered.

out further evidence. The only defense here is sophistry built on a misstatement designed to persuade that a share of Christiana is, in reality, 1.15 shares of DuPont. The asserted "reality" is denied in the opinion below (App 57a). A statutory madrigal of cancellation and conversion cannot equal transubstantiation. At best, it can beg the question (see footnote 4 *supra*).

The conceded control (App. 41a, f. 3) and active participation in DuPont affairs of Christiana's directors and large holders of Christiana on DuPont's Board (App. 75a, 76a, 85a. 86a), the fact that neither of the two independent directors was utilized (App. 76a), the fact that McCoy, one of the negotiators, is also a director of Wilmington Trust Company (App. 75a), which will succeed Christiana as the largest holder of DuPont shares and which, in turn, has counter-fiduciary responsibilities, all lead to the conclusion that the merger, as presented, with its detriments, its "striking disparity" of benefits and (*a fortiori* but not defined) its ancillary deeply injurious registration rights agreement, was properly held to be a transaction not within the terms of Section 17(b), and that the ruling of the Commission that The Investment Company Act of 1940 created a safe haven as a matter of law so that a closed end Investment Company which has a fiduciary relationship with and controls an affiliated company can force a merger without allowing the controlled company to share in vast benefits and increments its forced consent makes possible, was erroneous and properly found so by the Court below.

This unique case, unless the reversal of the Court below stands, can only create mischief and endless distinctions on its special facts in future Section 17(b) applications. This is a kind of a matter that under all the circumstances should be laid to rest so that in the future, as in the past, fairness will be determined on various factors so aptly catalogued by DuPont's counsel (App. 53a, f. 12).

It is respectfully submitted that the petitions for writs of certiorari should be denied.

Respectfully submitted,

LEWIS C. MURTAUGH,
TIMOTHY J. MURTAUGH III,
111 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorneys for Lewis C. Murtaugh, Trustee.

APPENDIX I.

EXCERPTS FROM FINANCIAL STATEMENT
(C. A. APP. 715, 7, 8)

CHRISTIANA SECURITIES COMPANY
BALANCE SHEET
(DOLLARS IN THOUSANDS)

ASSETS

	June 30, 1972	December 31, 1975
Investments (Note 6):		
E. I. duPont de Nemours and Company:		
Common—13,417,120 shares	74,621.9	74,621.9
Preferred, $4.50 cumulative —16,256 shares.	1,298.1	1,298.1
Wilmington Trust Company, common—69,216 shares	903.6	903.6
The News-Journal Company (wholly-owned), common—7,460 shares	846.1	846.1
Total investments	77,669.7	77,669.7

NOTES TO FINANCIAL STATEMENTS
(DOLLARS IN THOUSANDS, EXCEPT PER SHARE)
(EMPHASIS SUPPLIED)

3. Unrealized Appreciation on Investments

The following amounts for unrealized appreciation on investments are computed *by subtracting the carrying values from the amounts obtained by multiplying the number of shares of the various investments by the respective quoted market prices* at the indicated dates (except the appraised value of $24,296.0 for the investment in The News-Journal Company applied retroactively for all applicable periods—see Note 6) and without regard to any effect of such unrealized appreciation on future Federal income tax liability. *The amounts so computed are not represented to be realizable values for blocks of shares of the magnitude held.*

	June 30, 1972	December 31, 1971	December 31, 1970	December 31, 1969
Balance beginning of period	$1,895,819.5	$1,740,017.5	$1,359,258.0	$2,165,213.1
Balance end of period	2,150,851.6	1,895,819.5	1,740,017.5	1,359,258.0
Increase (decrease) during the period	$ 255,032.1	$ 155,802.0	$ 380,759.5	$ (805,955.1)

6. Investments

The carrying value of each of the investments in capital stocks is the same as the basis for Federal income tax purposes.

The quoted market price per share of investments at June 30, 1972 and December 31, 1971 and the amounts obtained by multiplying such prices by the number of shares on those dates were as follows:

	June 30, 1972		December 31, 1971	
	Quoted Market Price Per Share	Shares Owned Times Price Per Share	Quoted Market Price Per Share	Shares Owned Times Price Per Share
E. I. duPont de Nemours and Company:				
Common	$164.00	$2,200,407.7	$145.00	$1,945,482.4
Preferred	71.00	1,154.2	69.75	1,133.9
Wilmington Trust Company, Common	39.00	2,154.2	37.75	2,612.9
The News-Journal Company, Common	(a)	—	(a)	—

The amounts computed as shown above are not represented to be either the aggregate quoted market or realizable values of the respective investments.

7. NET ASSET COVERAGE AND NET ASSET VALUE

The following sets forth the net asset coverage per share of preferred stock and the net asset value per share of common stock outstanding at June 30, 1972 and December 31, 1971, *computed as to the valuation of investment securities on the basis of multiplying the number of shares of the various investments by the respective quoted market prices per share at those dates* (except for an aggregate of $24,260.0 for the investment of The News-Journal Company applied retroactively at both dates—see Note 6) *and including such unrealized appreciation of investments without regard to any effect thereof on furture Federal income tax liability*:

	June 30, 1972	December 31, 1971
Net asset coverage per share of preferred stock, 106,-500 shares outstanding .	$21,091.32	$18,681.79
Net asset value per share of common stock, 11,710,-103 shares outstanding:		
On basis of preferred stock having a liquidation value of $100 a share	$ 190.91	$ 169.00
On basis of preferred stock having a redemption value of $120 a share	$ 190.73	$ 168.81

APPENDIX II.

8. THE MERGER TERMS ARE PATENTLY NOT BALANCED AT ALL AND ARE UNFAIR ON THEIR FACE

Using pre-merger talk figures, this is what the Opinion and Order sanctions:

Christiana Shareholder Gets	DuPont Shareholder Gets
$41.25 in added *available* price of investment (close to half billion dollars)	$1.10 increase in equity per share (80 cents net) (Not an *available* sum to shareholders.)
7.2% increase in dividends.	3 cents increase in share of earnings. $7.34 vs. $7.31 per 1971 figures (Also not available)
Liquidity (Opportunity to cash in marketable shares.)	No increase in market value
Registration rights. (Not available to unaffiliated shareholders.)	Loses:
¼ free of restrictions for unaffiliated shareholders.	Effect of Market Impact of added shares. Affects DuPont as a company as to shares issued in acquisition or in new financing, and also all stockholders who sell.
Tax free liquidation result.	Surrendered responsibility of directors to be guided by DuPont's interests from time to time in regard to Registration.
Operating cost elimination .3%	Management responsibility to shareholders interest underwritten by Christiana's centralized shareholder interest in DuPont's operation and possibility of effectively protecting DuPont shareholders from poor management.
Relinquishes:	
(Transfers)	
Voting Control	

DuPont Management Gets
Control*

* Except it surrenders control of registrations.

APPENDIX III.

Comments on Harriman v. *DuPont*

With reference to the opinion in the case of *Harriman* v. *DuPont*, (D. Del. 12/23/75) now published at 411 F. Supp. 133, which is referred to in the D-C Petition, a substantial portion of the opinion being included in its appendix, there is this to be said: The record in the Eighth Circuit includes a rather extensive "Application for a Stay of the Order of the Securities and Exchange Commission Pending the Results of the Review in the Eighth Circuit." The lack of such a stay or a pending Application therefor was the original reason given by the District Court for going ahead with the trial that would have been mooted if the SEC exemption had been, as it was, reversed. Subsequently, the same reason was given for not delaying issuing an opinion and order. This was the reason for the Application for a stay by this Respondent, who was also co-counsel for the Delaware plaintiffs. The several grounds urged for a stay and for the Delaware District Court not dealing with this matter are apparent from the petition but undoubtedly too detailed for this filing. Subsequent to the entry of the Eighth Circuit Court Opinion and an Order, in one of the filings for DuPont and Christiana, in opposition to plaintiffs' motion to alter and amend the order and the opinion of the Delaware District Court, in view of the Eighth Circuit Court's ruling, which, if final, made the transaction impossible, the corporate petitioners here (and the defendants there) filed an answer as follows:

> "The issues that have been resolved by this Court were not before the Eighth Circuit and are not touched by its decision. This Court determined, after trial, that the terms of the proposed merger in no way violate the laws of Delaware and provide no basis for an action under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The Eighth Circuit recognized that its decision did not purport to deal with either of these issues (Slip Op. 26, fn. 18; 32, fn. 23), and this Court's opinion specifically notes that 'the issues before this Court and the Eighth Circuit are separate and distinct' (Op. 38, fn. 109)." (See also footnote 131 at the D-C Petition Appendix Page 2a.)

The Eighth Circuit did not choose to act on the application for a stay and the Delaware District Court judge did not originally choose to delay until the Eighth Circuit acted. However, the Eighth Circuit Court Opinion was soon thereafter rendered while the Motion to Alter and Amend was still pending and the Delaware District Court judge did vacate the final judgment under Rule 54(b) deciding Delaware law and Rule 10b5 issues (which reserved matters as to a future proxy), and entered a nonappealable general judgment on the issues raised by the pleadings with a like reservation, and with no statement as to finality. It goes without saying that this nonappealable judgment of the District Court is only an interim one and does not rise to the dignity of a counter-authority on the issues presented (as the D-C Petition now ambivalently chooses to use it, while previously protesting its inapplicability). Since both courts explicitly walked wide of each other via the two footnotes in each opinion, the footnotes should be taken in good faith, and any relevant bearing here of the language of the Court quoted in the D-C Petition Appendix as offered here was rendered on a matter which the Court had no jurisdiction and is an obvious usurpation of and intrusion upon the role that the Eighth Circuit had under Section 43(a) of the 1940 Act, which gave it exclusive jurisdiction to review the order of the Commission granting exemption and to find the facts and law applicable in judging fairness under the 1940 Act as well as the other stipulations of Section 17(b). (The SEC is not a party to the Delaware proceeding.)

PAGE 38

SC

Supreme Court, U. S.
FILED
AUG 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY and CHRISTIANA SECURITIES COMPANY,
Petitioners,
v.
RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,
v.
RICHARD J. COLLINS, JR., et al.,
Respondents.

REPLY OF PETITIONERS E. I. DU PONT DE NEMOURS AND COMPANY AND CHRISTIANA SECURITIES COMPANY

DANIEL M. GRIBBON
CYRIL V. SMITH, JR.
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner
E. I. du Pont de Nemours & Company

MATTHEW J. BRODERICK
RICHARD S. SELTZER
EDWARD J. MCINTYRE
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, Pa. 19102
Attorneys for Petitioner
Christiana Securities Company

August 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY and CHRISTIANA SECURITIES COMPANY,
Petitioners,

v.

RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
Respondents.

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

RICHARD J. COLLINS, JR., et al.,
Respondents.

REPLY OF PETITIONERS E. I. DU PONT DE NEMOURS AND COMPANY AND CHRISTIANA SECURITIES COMPANY

The briefs for respondents in opposition to the grant of writs of certiorari in these cases make clear that the overriding issue is whether a majority of the Court of Appeals has intruded into a domain that the Congress

under the Investment Company Act has set aside for the Securities and Exchange Commission.

The terms of merger between private corporations are ordinarily negotiated by management or the board of directors subject to the approval of the holders of a statutorily prescribed percentage of the outstanding voting stock of both companies. However, in the case of a merger between an investment company and its affiliate, Congress has provided that in addition the Securities and Exchange Commission must find that the terms are fair and reasonable and do not involve overreaching on the part of any person concerned. The Commission, following an evidentiary hearing, has unanimously so found in this case.

Upon the petition of two Du Pont stockholders, a majority of the Court of Appeals has expressed disagreement with the judgment of the Commission. No procedural irregularities are attributed to the Commission and the standard of fairness the Commission applied was well within its discretion. However, the majority below have concluded, in substance, that if they were sitting as members of the Commission they would have found the merger terms unreasonable.[1]

In so acting they have transgressed the line between agency action and court review that has been so explicitly delineated by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947). The matters on which the majority disagree with the Commission—the significance of market prices,

[1] The Court of Appeals by an equally divided vote denied petitions for rehearing and suggestions for rehearing en banc (App. E to Petition in 75-1872).

ascertainment of intrinsic investment values, and discharge of fiduciary responsibilities—are clearly within the area of the Commission's special competence and expertise. Its decision is a well-articulated appreciation of the complexities of the problems and reflects a realization of the statutory policies at issue and a responsible treatment of the uncontested facts.

No additional facts or legal principles entered into the majority's disagreement with the Commission's judgment. Motivated by an expressed concern that the "Du Pont family" in some way be required to pay for the "economic, political and social advantages" that they had enjoyed in the past, they rejected the Commission's determination of fairness (App. 87(a) to Petition in 75-1872). In so acting they disregarded the direction of the Congress that determinations of fairness under the Investment Company Act are the responsibility of the Commission subject to court review and reversal only for demonstrable error.

So clear is the majority's usurpation of the Commission's function that this Court might appropriately grant writs of certiorari and reverse summarily on the ground that the action by a majority of the court below is plainly at odds with the "inveterate and certain" rule of prior decisions of this Court. *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, No. 75-1504, decided June 14, 1976; *see also Ralston Purina Co.* v. *Louisville & Nashville R.R. Co.*, No. 75-1015, decided June 14, 1976 (summarily reversed because district court substituted its judgment for that of the Interstate Commerce Commission); and *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, No. 75-584, decided January 19, 1976 (summarily reversed because

Court of Appeals overstepped the bounds of its reviewing authority).

Respectfully submitted,

DANIEL M. GRIBBON
CYRIL V. SMITH, JR.
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner
E. I. du Pont de Nemours & Company

MATTHEW J. BRODERICK
RICHARD S. SELTZER
EDWARD J. MCINTYRE
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, Pa. 19102
Attorneys for Petitioner
Christiana Securities Company

August 1976

Supreme Court, U. S.
FILED
NOV 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Petitioners,

v.

RICHARD J. COLLINS, JR., ET AL., *Respondents.*

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION, *Petitioner,*

v.

RICHARD J. COLLINS, JR., ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS E. I. du PONT de NEMOURS AND COMPANY AND CHRISTIANA SECURITIES COMPANY

Of Counsel

CHARLES E. WELCH
ROGER W. ARRINGTON
7038 Du Pont Building
Wilmington, Delaware 19898

DANIEL M. GRIBBON
CYRIL V. SMITH, JR.
JAMES M. McHANEY, JR.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner E. I. du Pont de Nemours and Company

MATTHEW J. BRODERICK
RICHARD S. SELTZER
EDWARD J. McINTYRE
Dechert Price & Rhoads
3400 Centre Square West
Philadelphia, Pa. 19102

Attorneys for Petitioner Christiana Securities Company

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	3
Statement of the Case	3
Summary of Argument	8
Argument	11
I. In Applying to This Merger the Criteria Set Forth in the Investment Company Act the Commission Faithfully Discharged the Responsibility Delegated to It By Congress	11
A. The Commission Correctly Perceived That the Proposed Merger Consists in Substance of an Exchange of Du Pont Common Stock for Du Pont Common Stock	13
B. The Commission Properly Attached Primary Significance to the Value of Christiana's Assets—Essentially Du Pont Common Stock—in Approving the Proposed Merger Terms	15
C. On the Basis of Reasoned Analysis, the Commission Rejected Contentions That the Merger Terms Should Not Reflect the Value of Christiana's Holding of Du Pont Common Stock	22
Market Price of Christiana Stock	23
Benefits of the Merger	23
Earmarks of an Arm's Length Bargain	26
Impact on Market Price of Du Pont Stock	32

Page

II. The Court of Appeals Did Not Accord the Judgment of the Commission the Deference Required by the Investment Company Act and Decisions of this Court 36

Conclusion 40

Appendix A A-1

Appendix B B-1

TABLE OF AUTHORITIES

Cases:

Camp v. *Pitts*, 411 U.S. 138 (1973) 39
Central States Elec. Corp. v. *Austrian*, 183 F.2d 879 (4th Cir. 1950), *cert. denied*, 340 U.S. 917 (1951) .. 21
Federal Power Commission v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976) 39, 40
Federal Trade Commission v. *Mandel Brothers*, 359 U.S. 385 (1959) 21
Harriman v. *E. I. du Pont de Nemours and Co.*, 411 F. Supp. 133 (D. Del. 1975) 8, 18, 19, 27, 31
National Labor Relations Board v. *Boeing Co.*, 412 U.S. 67 (1973) 21
Niagara Hudson Power Corp. v. *Leventritt*, 340 U.S. 336 (1951) 14, 15
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 (1933) 22
Otis & Co. v. *Securities and Exchange Commission*, 323 U.S. 624 (1945) 30
Pepper v. *Litton*, 308 U.S. 295 (1939) 27, 28, 29
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367 (1969) 21-22
Saxbe v. *Bustos*, 419 U.S. 65 (1974)..... 21

Page

Securities and Exchange Commission v. *Central-Illinois Securities Corp.*, 338 U.S. 96 (1949) 30
Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 (1947) 10, 12, 36, 38, 40
Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) 21
United States v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975) 16, 21
United States v. *Republic Steel Corp.*, 362 U.S. 482 (1960) 21

Administrative Agency:

Central States Elec. Corp., 30 S.E.C. 680 (1949) ...19, 20
Century Investors, Inc., 40 S.E.C. 319 (1960) 20
Delaware Realty and Inv. Co., 40 S.E.C. 469 (1961)..18, 25
Detroit and Cleveland Nav. Co., Investment Company Act Release Nos. 3082 and 3099 (July 27 and August 19, 1960) 18
Eastern States Corp., Investment Company Act Release Nos. 5693 and 5711 (May 28 and June 16, 1969) 18
Electric Bond and Share Co., Investment Company Act Release No. 5215 (December 28, 1967) 20
Harbor Plywood Corp., 40 S.E.C. 1002 (1962) 18, 25
Huyler's Investment Company Act Release Nos. 5773 and 5809 (August 13 and September 9, 1969) 18
New York Dock Co., 38 S.E.C. 754 (1958)..... 20
Southeastern Capital Corp., Investment Company Act Release Nos. 4110 and 4133 (December 23, 1964 and January 12, 1965) 20
Southport Commercial Corp., Investment Company Act Release Nos. 4165 and 4180 (February 17 and March 5, 1965) 18
Talley Industries, Inc., Investment Company Act Release No. 5953 (January 9, 1970) 19
Townsend Corp., Investment Company Act Release No. 4045 (September 2, 1964) 19

Page

STATUTES:

Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*:
- Section 2, 15 U.S.C. § 80a-2 4
- Section 9, 15 U.S.C. § 80a-9 11
- Section 10, 15 U.S.C. § 80a-10 11
- Section 15, 15 U.S.C. § 80a-15 11
- Section 16, 15 U.S.C. § 80a-16 11
- Section 17, 15 U.S.C. § 80a-17 .. 2, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 24, 26, 27, 28, 31, 32
- Section 18, 15 U.S.C. § 80a-18 .....11, 17
- Section 22, 15 U.S.C. § 80a-22 .....16, 21
- Section 23, 15 U.S.C. § 80a-23 .....11, 17
- Section 43, 15 U.S.C. § 80a-42 .....2, 38, 39

Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.*:
- Section 11, 15 U.S.C. § 79k 15

28 U.S.C. § 1254(1) 2

ADMINISTRATIVE REGULATIONS:

Treasury Regulation § 20.2031-1(b) 31

LEGISLATIVE MATERIAL:

Securities and Exchange Commission Report on Investment Trusts and Investment Companies, Part One, H.R. Doc. No. 707, 75th Cong., 3d Sess. (1938); Part Two, H.R. Doc. No. 70, 76th Cong., 1st Sess. (1939); Part Three, H.R. Doc. No. 279, 76th Cong., 1st Sess. (1939); Parts Four and Five, H.R. Doc. No. 246, 77th Cong., 1st Sess. (1941) .. 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL., *Petitioners,*

v.

RICHARD J. COLLINS, JR., ET AL., *Respondents.*

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION, *Petitioner,*

v.

RICHARD J. COLLINS, JR., ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF PETITIONERS E. I. du PONT de NEMOURS AND COMPANY AND CHRISTIANA SECURITIES COMPANY

OPINIONS BELOW

The opinions and orders of the Securities and Exchange Commission ("Commission"), the majority and dissenting opinions of the Court of Appeals for the Eighth Circuit, the judgment of that Court, and

the order of that Court denying, by an equally divided vote, petitions for rehearing and suggestions for rehearing in banc are set out in the Appendix to the Commission's petition for a writ of certiorari in No. 75-1872.* The opinions and orders of the Commission were issued on December 13, 1974 and February 27, 1975 (Investment Company Act Release Nos. 8615 and 8692) and are not yet officially reported. The majority and dissenting opinions of the Court of Appeals were rendered on January 23, 1976 and are reported at 532 F.2d 584.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1976, and timely petitions for rehearing and suggestions for rehearing in banc were denied on February 26, 1976. The Commission and the petitioners were granted an extension of time to file petitions for writs of certiorari until June 25, 1976. The petition of E. I. du Pont de Nemours and Company ("Du Pont") and Christiana Securities Company ("Christiana") was filed on that day. The Commission was granted a further extension and filed its petition on June 26, 1976. Both petitions were granted on October 4, 1976, and the cases were ordered to be consolidated. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 17 and 43 of the Investment Company Act, 15 U.S.C. §§ 80a-17, 42 are set out in relevant part in Appendix A to this brief.

---

* That appendix will be referred to as "Pet. App." The Joint Appendix of the parties will be referred to as "A.".

QUESTION PRESENTED

Whether the Court of Appeals was warranted in rejecting the Commission's determination that the terms of the proposed merger of Christiana, a registered investment company, and its operating affiliate, Du Pont, are fair and reasonable and involve no overreaching, as required by the Investment Company Act of 1940, because they reflect the value of Christiana's assets, consisting almost exclusively of Du Pont common stock, which would be exchanged for Du Pont common stock in the merger; the Court of Appeals being of the view that the merger terms should reflect the price at which Christiana's common stock is traded in the market.

STATEMENT OF THE CASE

Du Pont and Christiana have entered into an agreement to merge. Christiana's principal holding, which constitutes in excess of 98 percent of its assets, is Du Pont common stock with a value of approximately $2 billion as of the date of the merger agreement, representing 28 percent of the total Du Pont common stock outstanding. The merger terms provide that Du Pont will receive for retirement all the Du Pont common stock held by Christiana, as well as Christiana's miscellaneous assets.[1] In return, Du Pont will issue in a tax-free exchange new shares of Du Pont common stock equal in value to 97.5 percent

---

[1] Such assets consist of cash, a 3 percent interest in the Wilmington Trust Company, all the stock of a newspaper, The News-Journal Company, and a small holding of Du Pont preferred stock, which had, as of the time of the merger agreement, an aggregate net value of some $26 million. That valuation is not contested in these proceedings.

of Christiana's net asset value. Such value represents the market or appraised value of Christiana's assets less liabilities and minor adjustments for the expense of disposing of certain of those assets other than Du Pont stock. The manner in which net asset value was computed is set forth in Appendix B to this brief.

Neither Christiana nor Du Pont is under any compulsion—legal or otherwise—to merge. The merger was proposed by Christiana because its management, consisting of large stockholders who had been closely associated with Du Pont, concluded that Christiana had outlived its usefulness as a holding company for Du Pont stock. Because of the taxes incurred in continuing as a corporation and the discount from net asset value at which Christiana stock traded, it seemed desirable that Christiana stockholders become direct instead of indirect owners of Du Pont stock (Pet. App. 10a-13a; A. A104). The Du Pont management perceived no disadvantages to either Du Pont or its stockholders in the proposed merger and considered highly desirable, as a protection against uncertainties in the future, the dispersion of the ownership and vote of Du Pont stock that would be accomplished by the merger (A. A573).

Christiana is an investment company subject to regulation by the Commission under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.* Christiana and Du Pont are considered "affiliated persons" of each other under Section 2(a)(3) of the Act inasmuch as Christiana owns more than 5 percent of the outstanding stock of Du Pont. Section 17 of the Act makes it unlawful for an affiliated person of an investment company to purchase from that investment company any security or other property but provides

that the Commission shall issue an order granting an exemption from such prohibition if the evidence establishes that:

> "the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned. . . ." 15 U.S.C. § 80a-17(b)(1).

Under long-standing Commission interpretation of the Act, not contested here, a merger transaction is subject to Section 17. Accordingly, the terms of the proposed merger were negotiated and agreed upon with full realization that they would have to be approved by the Commission.

Christiana and Du Pont filed with the Commission a Joint Application for approval which was subsequently supplemented by six amendments (A. A81). The Notice of Application issued by the Commission to allow interested persons to file requests for hearing was sent by Christiana and Du Pont, respectively, to each of the approximately 8,000 Christiana stockholders and 225,000 Du Pont stockholders (A. A974).

The Commission ordered a hearing on the application, which was held before an Administrative Law Judge and extended over seven days. Three stockholders of Du Pont and one stockholder of Christiana participated in the hearing. Only the former objected to the merger terms. The evidence received at the hearing, in addition to the comprehensive application and amendments, included testimony from the parties' financial advisors,[2] members of the special committees

---

[2] Morgan Stanley & Co., The First Boston Corporation and Kidder, Peabody & Co., Incorporated.

of each company's Board of Directors who had negotiated the terms of the merger, a senior Du Pont financial officer who was responsible for preparation of the merger documents, and a senior trust officer of Manufacturers Hanover Trust Company, which had a fiduciary responsibility for approximately 258,000 shares of Du Pont common stock, all in support of the merger terms. No witnesses were presented in opposition.

The Commission, acting unanimously in a comprehensive and reasoned Opinion, determined that the terms of the proposed merger were fair and reasonable and did not involve overreaching on the part of any person concerned, and granted the exemption provided for in Section 17(b).

The Commission took into account these salient factors in approving the merger terms. Christiana is owned by approximately 8,000 investors (Pet. App. 4a). Du Pont is a diversified chemical enterprise with approximately 47.5 million shares of common stock held by some 225,000 stockholders (Pet. App. 13a fn.34, 16a). Du Pont common stock is traded on the New York and other stock exchanges. Christiana stock, which is traded in the over-the-counter market (Pet. App. 4a), has historically sold at a discount of 20 to 25 percent from the market value of its assets (Pet. App. 13a). That discount appears to reflect the 7.2 percent federal income tax on intercorporate dividends that is payable by Christiana (Pet. App. 12a), the substantial potential capital gains tax that would be payable should Christiana sell its Du Pont stock for cash (Pet. App. 14a) and the comparatively thin trading in Christiana stock (Pet. App. 30a fn.51). The discount from the market value of Christiana's assets—which approximated $450 million prior to an-

nouncement of the merger negotiations—will be eliminated when the merger is consummated. Inasmuch as Du Pont will be issuing stock equal in value to 97.5 percent of Christiana's net asset value, the merger will benefit Du Pont stockholders by some $55 million (A. A94).

The Commission viewed the proposed merger as essentially an exchange of equivalents: Du Pont stock to be issued by Du Pont for the Du Pont stock presently owned by Christiana (Pet. App. 9a). It reasoned that an investment company, such as Christiana, whose assets consist of securities the values of which are determined in active markets, can normally be presumed to be worth its net asset value (Pet. App. 32a). The Commission, acting on the recommendation of its Division of Investment Management Regulation, considered and rejected the contentions advanced by the three objecting Du Pont stockholders as to why such value should not be looked to in this case. It found that the market value of Christiana common stock was not determinative of the merger terms, and that the merger would result in no detriment to Du Pont or its stockholders (Pet. App. 32a fn.57, 28a-31a). Moreover, the Commission concluded that any significant departure from net asset value as the basis for merger terms would be unfair because it would strip Christiana stockholders of some of the intrinsic value of their investment (Pet. App. 33a).[3]

---

[3] The Commission approved the 2.5 percent discount from net asset value proposed by Du Pont and agreed to by Christiana, as being within the range of fairness (Pet. App. 35a-36a); that discount in favor of Du Pont stockholders was somewhat higher than any discount previously approved by the Commission (1.5%) or found in comparable transactions not subject to Commission approval (1.8%) (A. A244-A247, A687-A688).

In response to petitions for review filed by two of the objecting Du Pont stockholders, the Court of Appeals, in a 2-1 decision, joined in by a Senior District Judge from outside the Circuit, set aside the order of the Commission and thereafter declined to rehear the matter in banc. A majority of the Court of Appeals differed with the Commission in the following principal respects. The majority rejected net asset value as the lodestar in investment company valuation (Pet. App. 53a, 58a, 61a, 72a), regarded the market value of Christiana common stock as determinative (Pet. App. 58a), criticized the Commission for not ascertaining whether the merger terms bore the earmarks of an arm's length bargain (Pet. App. 61a), and found that fairness required the Christiana stockholders to surrender to Du Pont a significant portion of the tax savings achieved by the merger because, in the court's view, the "du Pont family" had retained over the years "the economic, political and social advantages that accompanies control of one of America's largest industrial concerns."[4] (Pet. App. 87a).

SUMMARY OF ARGUMENT

The Commission's action in approving the terms of the proposed merger of Du Pont and Christiana as fair and reasonable and reflecting no overreaching

[4] One of the respondents herein, Lewis C. Murtaugh, while the matter was under consideration by the Commission, brought a stockholder's derivative action claiming a violation of Delaware State Law and also of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)). Following a full evidentiary hearing, that challenge was rejected by the United States District Court for Delaware in a comprehensive opinion that deals with the factual contentions advanced by the respondents and considered by the Court of Appeals. Harriman v. E. I. du Pont de Nemours and Co., 411 F.Supp. 133 (D. Del. 1975).

should be upheld. Those terms reflect in substance the exchange of equivalents—Du Pont common stock now owned by Christiana is to be exchanged for Du Pont common stock to be issued by Du Pont.

The Commission correctly determined that since the Investment Company Act was designed to protect the stockholders of investment companies against dilution of the inherent value of their investment, fairness under the Act requires that the merger terms be based upon the net asset value of Christiana. Such value consists almost exclusively of Du Pont common stock which is what Christiana is giving up and Du Pont is receiving in the merger.

The market price of Christiana common stock—which discounts its holding of Du Pont common stock by some 20 to 25 percent—does not measure Christiana's contribution to the merger. The medium of exchange for both parties to the merger is Du Pont common stock. The tax and market appreciation benefits that will flow to Christiana stockholders from the merger will constitute no detriment to Du Pont; that the benefits flowing to Du Pont are lesser in magnitude does not require that Christiana turn over to Du Pont a large portion of the tax savings and market appreciation that may accrue to Christiana stockholders. The Commission properly determined that its informed judgment as to fairness, reasonableness and overreaching, rather than the parties' bargain—however arm's length—should control in transactions subject to Section 17. Respondent Murtaugh's predictions that the merger would bring about massive selling with an adverse impact on the price of Du Pont common stock have, as the Commission found, no basis in fact. They reflect in large part a serious misconception on

his part as to the nature of this tax-free merger which, unlike a taxable divestiture, creates no need to sell stock either to pay taxes or to comply with a court order.

The Commission's action carries out the objectives of the Investment Company Act, is wholly consistent with the Commission's long-standing interpretation of Section 17(b), and finds support in other decisions by the Commission and courts in the regulation of public utility holding companies. It is not inconsistent with any decision of the Commission or that of any court. It constitutes the reasoned exercise by the Commission, based on its administrative experience and expertise, of a judgment in a matter, *i.e.*, fairness, as to which the Congress has delegated to the Commission broad authority. It is thus a judgment which is "entitled to the greatest amount of weight by appellate courts." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947). In addition, none of the considerations relied upon by the Court of Appeals or the respondents detracts from the conclusion that the merger terms agreed to by the parties and approved by the Commission are fair, reasonable and involve no overreaching.

The decision of the Court of Appeals setting aside the Commission's action is vitiated not only by that Court's failure to accord the Commission's judgment the deference required by Congress and by decisions of this Court, particularly *Chenery*, but also by its failure to follow proper appellate procedure.

ARGUMENT

I. IN APPLYING TO THIS MERGER THE CRITERIA SET FORTH IN THE INVESTMENT COMPANY ACT THE COMMISSION FAITHFULLY DISCHARGED THE RESPONSIBILITY DELEGATED TO IT BY CONGRESS.

Congress has delegated to the Commission responsibility for the administration of the Investment Company Act. Under that Act, investment companies are subject to comprehensive federal regulation. The Act speaks to such basic matters as issuance of stock and debt securities (Sections 18 and 23), approval of underwriting contracts and investment advisory agreements (Section 15), relationships with affiliated persons (Section 17), and composition of boards of directors (Sections 9, 10 and 16). Accordingly, for over thirty-five years the Commission has been intimately involved in every phase of financial activity of every registered investment company. Virtually no important corporate decision can be made by a registered investment company without the oversight of the Commission. Often, as here, a specific Commission order is required before action may be taken.

This comprehensive pattern of regulation rests upon a perception by Congress of the special character of investment companies. They differ in almost every relevant respect from industrial enterprises. Their earning power, for example, is not based on productive assets, research, development of products and marketing techniques; it is instead directly dependent upon dividends or interest from portfolio securities. The unique nature of investment companies and the special role of the Commission in their regulation were brushed aside by the Court of Appeals. Rather than reviewing the determination of the Commission as to fairness, the

Court below approached the merger of Christiana and Du Pont as if it involved two operating companies, wholly free from governmental regulation.

The decision of this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947), aptly describes the special competence of the Commission to make the Section 17(b) inquiry and determination in this case:

> "The Commission's conclusion here [as to the fairness of a reorganization under the Public Utility Holding Company Act] rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. See *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 800. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb." 332 U.S. at 209.

The Commission, as appears from its reasoned analysis of all aspects of the proposed merger, appreciated the problems presented, properly discerned the relevant statutory policies and brought to bear its considerable administrative experience in concluding that the merger terms are fair and reasonable and do not reflect overreaching on the part of any person.

A. The Commission Correctly Perceived That the Proposed Merger Consists in Substance of an Exchange of Du Pont Common Stock for Du Pont Common Stock.

Christiana now owns approximately 13.4 million shares of Du Pont common stock. In the merger it will surrender those shares to Du Pont along with certain miscellaneous assets. Du Pont will retire the shares received and in return issue slightly fewer shares of its own common stock—about 13.2 million—for distribution to Christiana stockholders. The Commission, in considering the terms of the proposed merger, concluded that "substantially, all that we are dealing with is an exchange of equivalents." (Pet. App. 9a). Accordingly, it found that the value of the Du Pont shares owned by Christiana, *i.e.*, net asset value, which it had uniformly looked to in similar transactions, was the appropriate measure of Christiana's contribution to the proposed merger and should be the basis for the merger terms.[5]

The Court of Appeals disagreed. In its view it was the market price of the Christiana common stock that should determine the merger terms. It thus viewed the relevant exchange as being Du Pont common stock for Christiana stock:

> "It is the current worth of the Christiana stock given in exchange for the Du Pont stock that must be determined in order to pass on the reasonableness and fairness of the merger." (Pet. App. 58a).

---

[5] It is significant that under the operative language of Section 17 Du Pont, as an affiliated person of Christiana, may not "purchase from [Christiana] . . . any security or other property. . . ." Thus, the transaction passed upon by the Commission involves in essence Du Pont's proposed acquisition of the Du Pont stock held by Christiana, and accordingly it is the value of such stock to which the Commission must look.

This statement seriously misconceives the nature of the proposed merger. If two operating companies were to merge the relative market prices of their stock would be an important consideration, together with comparative earnings, dividends and other financial factors, in assessing the fairness of merger terms. The market price of an operating company's stock reflects the appraisal by the investment community of the operating assets, the skill of management, the potential for new products and increased earnings and other factors deemed important by investors.

The market price of Christiana common stock is determined by none of the foregoing factors or it would be essentially equal to the market price of the underlying Du Pont shares owned by Christiana. The discount, or difference between the net asset value and the market price of Christiana common stock, reflects the intercorporate dividend tax, the large capital gains tax which Christiana would be required to pay were it ever to sell its Du Pont holdings for cash and the relatively thin trading market for Christiana stock. All of these factors disappear in the merger. None of them detracts from the inherent value of Christiana's holding of Du Pont stock, which is what Du Pont receives in the merger.

The Court of Appeals' insistence that the merger terms reflect the market price of Christiana stock, and its refusal to accept the Commission's informed judgment as to fundamental investment values, is plainly at odds with this Court's decision in *Niagara Hudson Power Corp.* v. *Leventritt*, 340 U.S. 336 (1951). There, in upholding the Commission's determination that a plan of reorganization of a public utility holding

company was "fair and equitable" under Section 11 of the Public Utility Holding Company Act, the Court held that market prices were not controlling.

> "The informed judgment of the Commission, rather than that of the market, has been designated by the Act as the appropriate guide to fairness and equity within the meaning of the Act." 340 U.S. at 346-47.

As has been shown, the consideration to be exchanged by both Christiana and Du Pont consists essentially of shares of Du Pont common stock. Accordingly, the value of such shares should determine the terms of exchange, as the Commission held. The terms thus comport precisely with the test the Court of Appeals properly recognized but misapplied:

> "[T]he Commission must look to the value given and received by the respective shareholders to a merger. . . ." (Pet. App. 58a).

B. The Commission Properly Attached Primary Significance to the Value of Christiana's Assets—Essentially Du Pont Common Stock—in Approving the Proposed Merger Terms.

The significance attached by the Commission to Christiana's net asset value, *i.e.*, its holding of Du Pont common stock, is fully in accord with the basic objectives of the Investment Company Act. The Congressional declaration of policy, the structure of the Act, and judicial and Commission interpretations support the conclusion that investment company stockholders are to be protected against dilution of net asset value.

A comprehensive study of investment companies by the Commission, carried out pursuant to a specific

Congressional directive, laid the groundwork for the Act. *Report on Investment Trusts and Investment Companies.*[6] In Part Three of that Report, the Commission stated that net asset value is the fundamental basis for investment company valuation, and Congress accepted net asset value as the cornerstone of the Act.

> "To the investor not concerned with the immediate salability of his investment company security, asset value represents the actual value of his interest in his company; it constitutes the value of his property interest in the company, were it to be immediately dissolved." *Report on Investment Trusts and Investment Companies—Part Three, Abuses and Deficiencies in the Organization and Operation of Investment Trusts and Investment Companies,* H.R. Doc. No. 279, 76th Cong., 1st Sess. (1939) at 1396-97.

In *United States* v. *National Ass'n of Securities Dealers, Inc.,* 422 U.S. 694 (1975), this Court, in reviewing the legislative history of Section 22 of the Act, noted that one of the abuses at which it was aimed was selling practices under which the "equity interests of shareholders would suffer a . . . dilution." 422 U.S. at 709. The Court of Appeals accepted the importance of protecting net asset value in investment company regulation but only for open-end investment companies, which have outstanding securities redeemable at net asset value at the option of the holder. The Court of Appeals believed that the Commission had confused

[6] Part One of the Report is printed as H.R. Doc. No. 707, 75th Cong., 3d Sess. (1938). Part Two of the Report is printed as H.R. Doc. No. 70, 76th Cong., 1st Sess. (1939). Part Three is printed as H.R. Doc. No. 279, 76th Cong., 1st Sess. (1939). Parts Four and Five are printed as H.R. Doc. No. 246, 77th Cong., 1st Sess. (1941).

open-end investment companies with closed-end investment companies (Pet. App. 57a).

The Commission was well aware, however, of the distinction between the two types of investment companies but found no policy distinction which justified different treatment under Section 17. As the Commission noted, at the time the Act was passed, the phenomenon of market discount from net asset value was a factor that was common to closed-end companies such as Christiana, which do not extend a standing offer to redeem their securities (Pet. App. 32a fn. 57). Congress provided that this market phenomenon would not result in the dilution of the interest of stockholders in closed-end companies. Thus, Section 23(b) of the Act directs that no closed-end company "shall sell any common stock of which it is the issuer at a price below the current net asset value of such stock" with certain exceptions not here relevant. In addition, Section 18(a) of the Act strictly limits the issuance of debt or preferred stock by a closed-end company. The purpose of this limitation is to prevent undue dilution of net asset value in a falling market by reason of "leverage" attributable to senior securities.[7] Section 18(d), moreover, makes it unlawful for all investment companies to issue warrants or rights to purchase their own stock except exclusively and ratably to their own stockholders and further subject to the requirement that such rights may not extend beyond 120 days. Stockholders of investment companies are the only persons who may share in option benefits; to the extent that options ex-

[7] In a leveraged investment company, the net asset value of common stock would fall more rapidly in a declining market than the decline in the market value of the company's assets since senior securities would retain a fixed interest in those assets.

tending over the limited period permitted may involve some dilution of net asset value, outsiders may not benefit. The structure of the Act thus supports the Commission's view, rather than that of the Court of Appeals, that protection of net asset value extends to closed-end investment companies as well as open-end companies.

In requiring that the merger terms reflect the value of Christiana's assets the Commission also drew upon its own substantial experience in comparable transactions under Section 17(b) of the Act. In at least six earlier cases the Commission had passed upon the reorganization of a closed-end investment company and its affiliate when the principal securities holding of the investment company was stock of the affiliate.[8] In each case, the Commission determined that merger terms based on net asset value were fair, notwithstanding that the market price of the investment company's own stock, wherever a market existed, was significantly below such value.[9] In reviewing the Commission's established practice in these cases, the District Court in *Harriman* v. *E. I. du Pont de Nemours and Co., supra,* noted that:

[8] Huyler's, Investment Company Act Release Nos. 5773 and 5809 (August 13 and September 9, 1969); Eastern States Corp., Investment Company Act Release Nos. 5693 and 5711 (May 28 and June 16, 1969); Southport Commercial Corp., Investment Company Act Release Nos. 4165 and 4180 (February 17 and March 5, 1965); Harbor Plywood Corp., 40 S.E.C. 1002 (1962); Delaware Realty and Inv. Co., 40 S.E.C. 469 (1961); Detroit and Cleveland Nav. Co., Investment Company Act Release Nos. 3082 and 3099 (July 27 and August 19, 1960).

[9] Stock of Delaware Realty and Southport was closely held and had no public market.

> "The Securities and Exchange Commission, the agency authorized by Congress to implement the 1940 Act and pass upon otherwise prohibited transactions between investment companies and their affiliates . . . has consistently utilized net asset value as the controlling factor in section 17 proceedings. . . . This has been true notwithstanding the fact that the market value of the applicant investment company's stock was significantly lower than its net asset value. . . . Net asset value has also been utilized where no market existed for the common stock of an applicant investment company." 411 F.Supp. at 160.[10]

[10] The Court of Appeals refused to accord any weight to the Commission's long-standing position because of other Section 17(b) decisions, involving different types of companies, where net asset value was not the controlling factor. In the decisions cited by the Court of Appeals, however, the Commission was dealing with valuation not of investment companies whose sole assets consisted of marketable securities but of either "hybrid" investment companies which had operating assets or pure operating companies which fell within the ambit of Section 17 because of their affiliation with an investment company.

For example, the Court of Appeals cited Townsend Corp., Investment Company Act Release No. 4045 (September 2, 1964), in support of its position that the Commission has approved the valuation of an investment company on the basis of factors other than net asset value. In fact, the investment company's earnings there were used solely to compute the value of some of the investment company's assets which did not have an active market—its 100 percent ownership of certain radio stations. The Court of Appeals cited Central States Elec. Corp., 30 S.E.C. 680 (1949), as a case where net asset value was adjusted for the potential capital gains tax on unrealized appreciation of assets. The adjustment in that case related to assets that were to be sold in taxable transactions; here Christiana's holding of Du Pont stock is to be exchanged in a tax-free merger. Other decisions cited by the Court of Appeals in which the Commission departed from net asset value either involved the valuation of operating companies, Talley Industries, Inc., Investment Company Act Release No. 5953 (January 9, 1970), or involved the valuation of companies which were actually part invest-

Recognition of net asset value as the proper basis for investment company reorganizations has not been limited to transactions subject to Section 17(b). In *Central States Elec. Corp.*, 30 S.E.C. 680 (1949), the Commission recommended that net asset value, which it characterized as a "basic requirement" of valuation under the Investment Company Act, be used for bankruptcy reorganization purposes as well.

> "In the case of investment companies, such as the Debtor and its subsidiaries, which invest, reinvest, and deal in marketable securities, market prices are customarily used in appraising the value of their assets as well as their outstanding securities. * * * There are no fixed assets or equipment dedicated to a particular function; a specialized service is rendered only in the sense that the company offers diversification of investment and management of assets. In view of these characteristics, it is natural that net asset value based upon market prices should be the fundamental valuation criterion used by and large in the investment company field. In the absence of special circumstances, these characteristics constitute compelling reasons for considering net asset value as the primary measure of value of an investment company for reorganization purposes also." 30 S.E.C. at 700 (footnote omitted).

The District Court approved a plan of reorganization that reflected net asset value. The Court of Appeals affirmed its action, quoting with approval the language

---

ment company business and part operating business. Electric Bond and Share Co., Investment Company Act Release No. 5215 (December 28, 1967); Southeastern Capital Corp., Investment Company Act Release Nos. 4110 and 4133 (December 23, 1964 and January 12, 1965); New York Dock Co., 38 S.E.C. 754 (1958); Century Investors, Inc., 40 S.E.C. 319 (1960).

of the Commission set forth above. *Central States Elec. Corp.* v. *Austrian*, 183 F.2d 879, 884 (4th Cir. 1950), *cert. denied*, 340 U.S. 917 (1951).

It is well established that the long-standing administrative policy of the Commission is entitled to great weight.[11] Most recently, in *United States* v. *National Ass'n of Securities Dealers, Inc., supra*, the Court deferred to the Commission's consistent interpretation of the term "dealer" in Section 22(d) of the Act, as reflected in official statements of the Commission as well as determinations under the Act:

> "This consistent and longstanding interpretation by the agency charged with administration of the Act, while not controlling, is entitled to considerable weight." 422 U.S. at 719.[12]

---

[11] The Court of Appeals rejected the Commission's interpretation in part because many of the Section 17(b) proceedings were uncontested or not reviewed by any court (Pet. App. 62a-63a). As this Court has held, however, administrative interpretation may be established in many ways other than formal decisions following contested proceedings. In FTC v. Mandel Brothers, 359 U.S. 385 (1959), a consistent administrative construction that a sales slip constituted an invoice for purposes of the Fur Products Labeling Act was accorded great weight "even though it was applied in cases settled by consent rather than in litigation." 359 U.S. at 391. *See also*, United States v. Republic Steel Corp., 362 U.S. 482 (1960) (informal construction of Rivers and Harbors Act by Corps of Engineers); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (informal construction of Civil Rights Act by Department of Housing and Urban Development); Saxbe v. Bustos, 419 U.S. 65 (1974) (informal interpretation of Immigration and Nationality Act by Immigration and Naturalization Service).

[12] Deference to a long-standing administrative position is not, of course, unique to the Commission or the Investment Company Act. It has been applied by this Court in upholding administrative construction of a wide variety of statutes. See, *e.g.*, NLRB v. Boeing Co., 412 U.S. 67, 74-75 (1973) (NLRB lacks authority to regulate reasonableness of union fines); Red Lion Broadcasting

The utilization of the value of Christiana's assets to determine the terms of the proposed merger implements both the policy and language of the Investment Company Act, is consistent with the Commission's long-standing interpretations and should be approved by this Court under established principles of review.

C. On the Basis of Reasoned Analysis, the Commission Rejected Contentions That the Merger Terms Should Not Reflect the Value of Christiana's Holding of Du Pont Common Stock.

While the Commission concluded that fairness under the Investment Company Act required that the merger terms in this transaction reflect net asset value (Pet. App. 17a, 35a-36a), it reached that conclusion after consideration of an evidentiary record that set forth all other possible indicia of value, *e.g.*, market price, earnings, book value, etc. Because those factors were so clearly inappropriate in a transaction involving an exchange of equivalents, the Commission reached the ultimate conclusion that in this case the governing standard precluded use of any criterion other than net asset value.

The Commission carefully considered whether any of the contentions advanced by the respondents—which the Court of Appeals accepted in substance—warranted a departure from the use of net asset value in approving the terms of the proposed merger. The Commission analyzed those contentions and concluded that none of them altered the central and controlling fact that the merger would consist of

Co. v. FCC, 395 U.S. 367, 380-81 (1969) (FCC's view that fairness doctrine is in the public interest upheld); and Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933) (Tariff Board policy of maintaining confidentiality of production costs of individual firms under investigation upheld).

an exchange of Du Pont common stock for Du Pont common stock. As the Commission viewed the matter, only if the merger could reasonably be expected to cause some harm or detriment to Du Pont or its stockholders should the Christiana stockholders receive significantly less than the value of their assets.

> "Only if [the] decision to dismantle Christiana inflicts cognizable harm on Du Pont and on its stockholders unrecompensed by the proposed discount, can we insist on terms harsher for them than those now before us." (Pet. App. 21a-23a).[13]

Market Price of Christiana Stock. At the forefront of the Commission's consideration of the proposed merger terms was clear recognition that the market price of Christiana common stock was from 20 to 25 percent below the market value of Christiana's assets. The factors creating the discount are, however, tax and market factors—peculiar to Christiana as a corporate entity—which would disappear in the merger. Moreover, as has been shown (*supra*, pp. 13-15), it was not Christiana stock but Du Pont stock which Du Pont was receiving in the merger. The Commission also reasoned that Christiana stock was held principally by long-term investors and that to utilize its market price would have the effect of stripping from those investors a significant portion of the intrinsic value of their investment (Pet. App. 32a-33a).

Benefits of the Merger. The Commission was fully aware that there was an imbalance in the benefits flowing from the merger:

[13] Because Christiana stockholders would share in the discount as Du Pont stockholders, the actual dilution incurred by Christiana stockholders would be 1.8 percent (Pet. App. 13a).

> "The very slight reduction in the amount of Du Pont's outstanding common and the resulting increase in earnings per Du Pont common share is incommensurate with the tax and the market value benefits inuring to the Christiana stockholders." (Pet. App. 18a).

As the Commission found, the benefits to Christiana arise principally as the result of federal tax laws and stock market phenomena (Pet. App. 10a-11a). Its dividend income is taxed at a 7.2 percent federal tax rate. In addition, it does not appear to have immediately available to it any alternative course of action whereby its Du Pont stock could be distributed directly to its stockholders without significant and perhaps immeasurable tax effect.[14] Hence the final terms of the proposed merger, as well as the Commission's decision, reflect a recognition that the merger would be the only way of terminating Christiana's existence without adverse tax impact.[15]

---

[14] During the course of merger negotiations the parties devoted considerable attention to the possibility that Christiana might utilize a special form of liquidation under Section 333 of the Internal Revenue Code which would have reduced the tax impact of a distribution of Du Pont stock to its stockholders. Ultimately it was concluded that this route was too uncertain to pursue because there was no way to determine in advance the potential tax liabilities of the Christiana stockholders (A. A877-A879).

[15] The Court of Appeals erred in asserting that the Commission's use of net asset value in applying Section 17(b) was limited to situations in which the investment company had available alternative methods of placing its assets in the hands of its stockholders without significant tax cost or other expenses (Pet. App. 63a-64a). Nothing in the language of the Act, the legislative history or the Commission's decisions would so limit the use of net asset value under Section 17. Moreover, in at least two instances the Commission has held merger terms based on net asset value to be fair notwithstanding the fact that, as here, there were no feasible alternatives to merger. In Harbor Plywood, *supra*, the evidence submitted at hearings indicated that liquidation was not financially feasible as an alternative to the merger because of tax and other considerations. Delaware Realty and Inv. Co., *supra*, involved a 1961 merger of Delaware Realty into Christiana. Delaware Realty owned approximately 33 percent of outstanding Christiana common stock, accounting for the bulk of its assets. Christiana's holdings then, as now, were principally in Du Pont common stock. Delaware Realty's net asset value was computed, not with respect to the market value of its block of Christiana stock, but rather as if Delaware Realty owned directly the Du Pont common stock held by Christiana. Both Delaware Realty and Christiana would have had to liquidate or to adopt exchange plans for Delaware Realty stockholders to achieve by other means underlying net asset value in terms of Du Pont stock, and, as the Commission opinion indicated, such alternatives would have involved tax problems. 40 S.E.C. at 473.

The Court of Appeals held that the Commission was required in its consideration of the proposed merger terms to allocate to Du Pont a share of the tax savings that Christiana and its stockholders might achieve by reason of the merger on the ground that "fairness requires that Du Pont share in the tax savings that result from its cooperation." (Pet. App. 86a fn.35).

In expressly rejecting this approach, the Commission said:

> "The heart of the matter is that the tax benefits to be reaped by the Christiana people will inflict no corresponding detriment on Du Pont or on its stockholders." (Pet. App. 23a fn.44).

This is not a taxable transaction, but a tax-free merger. The Internal Revenue Service has issued a ruling that the receipt of Du Pont stock by the stockholders of Christiana will not be a taxable transaction under the Internal Revenue Code.[16] Under the Court of Appeals' view, Christiana stockholders

---

[16] Pet. App. 93a fn. 4.

would be required to pay to Du Pont some major portion of the capital gains tax which would have been payable were this not a tax-free transaction."[17] As the Commission held, Du Pont has no property interest in the tax saving achieved by any Christiana stockholder (Pet. App. 24a).

Earmarks of an Arm's Length Bargain. The Court of Appeals misconceived the essential purpose of the Investment Company Act in its demand that the Commission disapprove the merger terms unless it found that they would have been reached in an arm's length bargain (Pet. App. 61a). The Commission quite properly viewed its responsibility as being to determine whether the proposed terms were fair and reasonable or reflected overreaching, as Section 17 provides. It declined to rely upon the substantial evidence that showed, despite the long and close relationship between the parties, complete independence of action by both Christiana and Du Pont in the negotiation of the merger terms.[18] It held that the manner in which

---

[17] It should be noted that the asserted savings of capital gains tax to Christiana stockholders are in reality deferrals of tax. Any former Christiana stockholder who sells Du Pont stock received in the merger will be required to pay a full capital gains tax based on the difference between the amount realized on such sale and the tax basis for the Christiana stock which is presently owned. Moreover, approximately 11 percent of Christiana stock is held by tax-exempt institutions that would pay no capital gains tax (A. A845).

[18] The evidence before the Commission establishes that the transaction did in fact carry the earmarks of an arm's length bargain. Among the factors supporting this conclusion are the following:

(a) The judgment of three independent financial advisers retained by the parties, The First Boston Corporation, Morgan Stanley & Co. and Kidder, Peabody & Co., Incorporated, was that the merger terms should approximate net asset value (A. A698-A699, A705-A706; A. A631-A632, A636-A637; A. A842-A844).

such terms were arrived at was of no consequence; what was significant was whether the ultimate terms met the statutory standard (Pet. App. 35a fn.62).

What the Court of Appeals failed to recognize was that Congress, in Section 17 of the Act, substituted the Commission's informed impartial judgment and the "fair, reasonable and no overreaching by any person" test for the results of arm's length bargaining. Cf. *Pepper* v. *Litton*, 308 U.S. 295 (1939). Arm's length bargaining is at best a crude and inexact

---

(b) Christiana had been valued at net asset value for purposes of Section 17(b) on at least three prior occasions: its own merger with Delaware Realty and Investment Co., which held 33 percent of Christiana stock, 40 SEC 469 (1961) and two exchange offers of portfolio securities with its stockholders (Pet. App. 64a).

(c) The Du Pont Negotiating Committee consisted of two senior executives who had no affiliation with Christiana. The Christiana negotiators held no positions with Du Pont. Those members of Du Pont's Board of Directors affiliated with Christiana took no part in the negotiations of the terms or the approval by the Du Pont Board (A. A91-A92).

(d) The 2.5 percent discount which was demanded by Du Pont is the largest discount ever accepted as fair by the Commission under Section 17(b), and is greater than the discount reflected in any comparable transaction not requiring Commission approval (A. A687-A688).

(e) Christiana, which was under no compulsion to merge, would not have accepted a discount greater than 2.5 percent (A. A563).

The District Court in Harriman v. E. I. du Pont de Nemours and Co., *supra*, expressly rejected the allegation of the plaintiffs in that case that Du Pont did not bargain at arm's length.

> "Since plaintiffs did not produce a scintilla of evidence that improper motivations or divided loyalties were responsible for what the Court regards as a sound negotiating strategem which ultimately resulted in a discount higher than any previously approved by the SEC, they cannot succeed on this facet of their case." 411 F. Supp. at 164.

method of determining fairness. It is little more than the law of the commercial and financial jungle. In applying the criteria of Section 17, the Commission recognized that its duty was to determine fairness objectively and not to be satisfied if the transaction merely "carries the earmarks of an arm's length bargain." *Pepper* v. *Litton*, 308 U.S. at 306-07.

Du Pont and Christiana were aware, too, from the outset of negotiations that neither was free to bargain in the spirit of a pawnbroker. Section 17 requires that the terms be fair to all concerned. In transactions not subject to Section 17 or a similar fairness standard, each party can attempt to utilize its strategic bargaining position with no holds barred. In this case the parties were advised that both financial and legal precedents dictated terms that reflected net asset value with a modest discount. In examining the terms agreed to by the parties the Commission speculated that Du Pont "in the course of bargaining between wholly unrelated parties" might have exacted a higher price for its agreement to merge (Pet. App. 24a). It observed, however, that a principal reason why Section 17 was enacted was "to prevent persons in a strategic position from using that position to effect transactions for other than fair value," (Pet. App. 24a-25a). Its reasoning makes clear why the Court of Appeals erred in demanding an arm's length inquiry rather than that provided in Section 17:

> "It is precisely because transactions of this character are replete with inherent conflicts of interest that the Act requires that they be submitted to us. As we said in *Atlas Corporation*, 37 S.E.C. 72, 85-86 (1956): 'It is evident that Section 17 of the Act was not designed to prohibit transactions solely for the reason that they are not

> negotiated at arm's-length. On the contrary, Section 17(b) of the Act directs us to exempt transactions between controlling or affiliated persons where the evidence establishes that the terms thereof are reasonable and fair and do not involve overreaching on the part of any person concerned. Clearly, Section 17 contemplates that transactions meeting these standards will be permitted although arm's-length bargaining may not have been present or, indeed, may have been impossible in view of the relationship of the parties.'" (Pet. App. 35a fn.62).

An arm's length bargain may involve such factors as negotiating tactics, strength of position, and so forth. Rarely is such a bargaining process concerned with fundamental investment values. It is the latter to which the Commission's judgment must, under the Act, be directed. Thus it would have been inappropriate for the Commission to attempt to ascertain whether the parties had bargained as if this were an ordinary commercial transaction, rather than a fundamental corporate realignment.

It may be that the fault found by the Court of Appeals in the Commission's inquiry into the proposed merger terms rests largely on semantics. In extolling *Pepper* v. *Litton* and related cases and urging that the arm's length bargaining principle is of "general application to corporate law and equity," the court concluded that such a principle "characterizes the type of unbiased scrutiny" that is essential in reviewing reorganizations (Pet. App. 61a fn.15). It cannot be questioned that in this case the Commission gave the proposed merger a full measure of "unbiased scrutiny." That it employed the relevant statutory test

rather than a more generalized judge-made test only means that the transaction received the searching inquiry determined appropriate by Congress.

In any event it is well established by decisions of this Court that in the discharge of its special statutory responsibilities the Commission is to develop and apply criteria of fairness suitable to the Acts of Congress that it administers. *Otis & Co.* v. *Securities and Exchange Commission*, 323 U.S. 624 (1945); *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U.S. 96 (1949). The teaching of such cases is that, in determining what is fair and equitable under the Public Utility Holding Company Act, the Commission must develop its own fairness standard based on the purposes of that Act. The Investment Company Act calls for a similar independent exercise of informed judgment by the Commission.

In *Otis*, although the plan of reorganization involved a liquidation in which the common stockholders would not have participated under the corporate charter provisions or "strict priority" rules applicable in bankruptcy, the Commission valued the interests of the common stockholders as though the company were a continuing enterprise. This Court upheld the Commission's determination of fairness:

> "Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve values to investors, not to destroy them. Consequently, while giving the Commission power to compel the elimination of holding companies deemed uneconomic, it allowed the affected companies to propose plans to the Commission to effectuate the objects and the Commission to approve such plans when they were considered 'fair and equitable.'" 323 U.S. at 636-37.[19]

In administering Section 17 of the Investment Company Act the Commission is under a mandate from Congress to approve merger terms between an investment company and its affiliate if such terms are fair and reasonable and do not reflect overreaching on the part of any person.[20] In carrying out this mandate, the

---

[19] As the Commission recognized (Pet. App. 21a fn. 42), the termination of Christiana's existence which would be accomplished by the proposed merger constitutes voluntary and desirable corporate simplification of a major industrial company similar to that which Congress has mandated for public utility companies. The Antitrust Division of the Department of Justice has urged in this Court the desirability of terminating the existence of Christiana (A. A694).

[20] While the Internal Revenue Code and the Delaware appraisal law are essentially irrelevant to the Commission's role in determining fairness under the 1940 Act, there is not, as the Court of Appeals suggested (Pet. App. 68a-72a), any inconsistency between the result reached here and the applicable provisions of those laws. In Harriman v. E. I. du Pont de Nemours and Co., *supra*, the District Court in passing upon the fairness of this proposed merger under Delaware law held that, since an appraisal proceeding is concerned with the statutory demand of the dissenter for an immediate cash payment for his stock, market price rather than net asset value may be the appropriate measure of value, but such market price does not govern the determination of fairness where the stockholder continues to have an on-going interest in the enterprise—as is the case in this merger. 411 F. Supp. at 155-56.

The estate and gift tax valuation cases cited by the Court of Appeals have no applicability. Those cases involve a tax based on "fair market value" of stock as of a particular date. The Tax Regulations define that value as the amount which would be paid in cash by a willing buyer to a willing seller. (Treasury Regulation Sec. 20.2031-1(b)). This revenue collecting concept has no place in the determination of fairness in mergers where the medium of exchange, on both sides of the transaction, is not cash but Du Pont stock, the receipt of which is not a taxable event.

Commission concluded that it would be unfair and unreasonable for Du Pont to appropriate from the Christiana stockholders, as the price of its agreement to merge, any significant portion of the increase in values that might flow to such stockholders as the result of tax savings—real and potential—and the stock market's appraisal of the value of stock held directly as compared with stock held indirectly through an investment company. Such appropriation on the part of Du Pont would have been, in the Commission's view, precisely the overreaching that Section 17 expressly forbids.

In rejecting the Commission's informed application of the "fair and reasonable and no overreaching" standard of Section 17(b), in favor of an "earmarks of an arm's length bargain" standard, the decision of the Court of Appeals would encourage—indeed demand—the very kind of "advantage-taking" that the Investment Company Act was intended to supplant.

Impact on Market Price of Du Pont Stock. Finally, the Commission considered at length the principal claim advanced by respondent Murtaugh that the merger would lead to such a volume of selling by former Christiana stockholders that the market price of Du Pont stock would be adversely affected over an extended period of time. The Commission viewed this as the "crux" of the case and carefully examined the extensive evidence that was adduced at the hearing (Pet. App. 25a). It determined that there was no evidence of long term adverse market impact and the Court of Appeals agreed (Pet. App. 90a fn. 39).

The Commission made specific findings that large Christiana stockholders lacked any present intention

or incentive to sell and that substantial post-merger sales were unlikely (Pet. App. 14a-15a, 25a fn.46). Such stockholders had for years been indirect investors in Du Pont and the merger would not change the essential nature of their investment—it would rest upon Du Pont's earnings and prospects. Moreover, there was no evidence that such stockholders had lost confidence in Du Pont and were desirous of bailing out. Indeed, the record shows that the directors of Christiana, who hold in the aggregate approximately 16 percent of the Christiana common stock, have no intention to sell Du Pont stock to be received in the merger and that Wilmington Trust Company, which holds in its trust department over 50 percent of Christiana common stock, likewise has no intention to sell, other than sales which might be required in connection with settlement of estates and similar administrative matters (A. A564-A566; A. A800-807).

As to the specific factors which would make selling unlikely, the Commission noted that the merger is conditioned upon the receipt of an Internal Revenue Service ruling that it will be tax free; thus former Christiana stockholders will be under no compulsion to sell to raise money to pay taxes (Pet. App. 7a, 34a fn.59). It also noted that there was no requirement of any kind—court order or otherwise—that forced any selling by Christiana stockholders so that each stockholder in deciding to sell or hold would be guided solely by his own investment judgment and self-interest (Pet. App. 33a-34a fn.59).[21] This circumstance the Commission saw

[21] The Commission found wholly unpersuasive the principal precedent advanced by respondent Murtaugh—the position taken by Du Pont in opposing a court order requiring the divestiture of its General Motors stock (Pet. App. 33a fn. 59). That divestiture, as proposed by the Government, did threaten to cause substantial

as a disincentive to selling. The Commission also found that "[m]ost of Christiana's stock has a very low basis in the hands of those who now hold it" because of the long-term nature of those holdings, and because of the reduction in tax basis resulting from distributions of General Motors stock pursuant to the divestiture by Du Pont of its interest in that company (Pet. App. 14a).

Based on all the evidence, the Commission specifically rejected respondent Murtaugh's claims of massive sales of Du Pont stock following the merger (Pet. App. 25a fn.46, 26a). The Commission went on to deal with the matter of what effect, if any, the occasional sales which it was agreed could take place might have on the market price of Du Pont stock, accepting as an assumption that there might be selling which "at certain points in time [would] be substantial." (Pet. App. 26a). The Commission's reasoning was based on its own expertise and knowledge of how securities markets operate.

> "[T]he merger might possibly engender selling of a volume that could on occasion cause Du Pont's market price to dip below the level at which it would otherwise stand. . . . We . . . conclude that such depressing effects on the price of Du Pont common as may occasionally manifest themselves by reason of the proposed transaction will be of relatively brief duration." (Pet. App. 28a-29a).

---

selling, but because of two factors not present here: the distribution would have been taxable as a dividend at rates up to 90 percent; and substantial sales of General Motors stock would have been required by court order. Thus the Commission found "the General Motors situation had nothing in common with this one." (Pet. App. 33a-34a fn. 59).

The basis for the conclusion reached by the Commission was that Du Pont's earning power and the trend of those earnings will be the basic determinant of the market price of its stock. The Commission stated:

> "In no way will the Christiana merger detract from either the assets or the earning power of [Du Pont.] The fundamentals of the situation will remain as they are." (Pet. App. 28a).

In finding that the merger would cause no detriment to Du Pont as a result of the claimed adverse market impact, the Commission declined to attempt to measure that impact on the basis of any specific number of shares to be sold at any specific time. It first pointed out how little weight could be accorded any such attempt because of the highly speculative nature of such an effort (Pet. App. 30a-31a). It noted the impossibility of determining how much Du Pont stock was likely to come on the market by reason of the merger in any given period of time. Even if an amount were assumed or speculated, the Commission questioned whether its impact on market price could be reasonably estimated. It finally observed in this respect that even an attempt to look at market impact after the merger, with all of the facts available, would be of little help because stock prices are so

> "volatile and the factors that influence them multifarious"

that there is no known way of isolating the actual, let alone the probable, effect of a single factor such as increased stock sales resulting from the merger (Pet. App. 31a).

The Court of Appeals agreed with the Commission's principal conclusion that the merger would not ad-

versely impact the market price of Du Pont stock for any extended period of time. It criticized the Commission, however, for not taking into account the possible short-term market impact of occasional large sales (Pet. App. 90a). The court thus set for the Commission an impossible task. Having determined that future short-term market behavior was too elusive to measure, the Commission would nonetheless be required to appraise it in passing on the fairness of merger terms.

The Commission's refusal to speculate on short-term market behavior is further supported by the circumstance that in this merger the parties are exchanging equivalents. Du Pont is exchanging and receiving in return shares of Du Pont common stock. The inherent investment value of what is being surrendered is thus the same as the value of what is being received. So long as these values are in line the Commission was satisfied that the merger would result in no detriment to Du Pont or its stockholders. As the Commission concluded, "the simple, readily usable tool of net asset value does the job much better than an accurate gauge of market impact (were there one) could." (Pet. App. 32a).

II. THE COURT OF APPEALS DID NOT ACCORD THE JUDGMENT OF THE COMMISSION THE DEFERENCE REQUIRED BY THE INVESTMENT COMPANY ACT AND DECISIONS OF THIS COURT.

As has been shown, the Court of Appeals accorded no deference to the Commission's informed judgment on fairness and investment values. In so acting it violated the basic principle of judicial review established by decisions of this Court, particularly *Securities and Exchange Commission* v. *Chenery Corp., supra*.

> "The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation. In that connection, the Commission has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience with reorganization matters. In essence, it has made . . . an informed, expert judgment on the problem. * * * The 'fair and equitable' rule of § 11(e) and the standard of what is 'detrimental to the public interest or the interests of investors or consumers' . . . were inserted by the framers of the Act in order that the Commission might have broad powers to protect the various interests at stake. The application of those criteria . . . necessarily requires the use of informed discretion by the Commission. The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters." 332 U.S. at 207-08 (citations omitted).

In addition, the procedure followed by the Court of Appeals in reviewing the Commission's order underscores the extent to which it went beyond proper judicial review in this matter. After receiving briefs and hearing argument, the Court of Appeals, over the objection of the Commission, Christiana and Du Pont, employed Professor Roger B. Upson, Associate Dean of the University of Minnesota College of Business Administration, "to assist the Court in understanding the record in this case and to prepare reports and memoranda for this Court in connection with that function." (Pet. App. 91a fn. 40; A. A981-A982). The report submitted by Professor Upson includes numerous data and observations that are not a matter of record, are not a proper subject of judicial notice and were, of course, at no time considered by the Commission which is charged by Congress with passing initial-

ly on all relevant evidence. For example, Professor Upson gave the greatest prominence in his report to an analysis performed by a Professor Halpern of some seventy-seven industrial mergers occurring in the period 1950-1965 (A. 985). That analysis, which does not deal with investment company mergers or recognize the difference between such mergers and those of industrial companies, drew the conclusion that any post-merger accretion in market value is divided, on the average, evenly between the two merger parties.[22] Applying this conclusion Professor Upson prepared and presented to the Court merger terms, quite different from those agreed to by the parties and approved by the Commission, which would have resulted in an approximately equal increase in the aggregate market value of Du Pont and Christiana (A. A985-A990). The mere consideration, *de novo*, of merger terms based on the Halpern study reflects the extent to which the Court departed from the *Chenery* principle of judicial review.

The Court of Appeals' jurisdiction to review orders of the Commission is specifically limited. The court may only:

> "affirm, modify, or set aside such order, in whole or in part . . . . The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. § 80a-42(a).

[22] In their comment on the Upson report filed with the Court of Appeals on December 22, 1975, Christiana and Du Pont included the data base for Professor Halpern's study. Analysis of this base shows that the average derived by the Professor is purely arithmetical and obscures such wide variations as to be useless as an analytical tool.

If additional evidence is deemed necessary, the matter must be remanded for additional proceedings by the Commission.

> ". . . If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken *before the Commission* and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. . . ." 15 U.S.C. § 80-42(a) (emphasis added).

Thus Professor Upson's participation in the review of the Commission's decision was in conflict with the explicit directions of Congress.

This Court has cautioned in other contexts that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). And only recently a Court of Appeals has been criticized for going outside the record in reviewing the action of an administrative agency. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976). Section 43(a) provides for review of the Commission's decision and the evidence on which it is based, and not review based on a record made in the reviewing court. The procedure followed by the Court of Appeals "clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' " *Federal Power Com-*

mission v. *Transcontinental Gas Pipe Line Corp.*, *supra*, 423 U.S. at 333, quoting from *Securities and Exchange Commission* v. *Chenery Corp.*, *supra*, 332 U.S. at 196.

CONCLUSION

The decision of the Court of Appeals should be reversed and the action of the Commission, which constitutes a reasoned exercise of informed judgment on a matter clearly within its administrative experience, affirmed.

Respectfully submitted,

Of Counsel

CHARLES E. WELCH
ROGER W. ARRINGTON
7038 Du Pont Building
Wilmington, Delaware 19898

DANIEL M. GRIBBON
CYRIL V. SMITH, JR.
JAMES M. McHANEY, JR.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner
E. I. du Pont de Nemours and Company

MATTHEW J. BRODERICK
RICHARD S. SELTZER
EDWARD J. McINTYRE
Dechert Price & Rhoads
3400 Centre Square West
Philadelphia, Pa. 19102

Attorneys for Petitioner
Christiana Securities Company

APPENDIX

APPENDIX A

Section 17 of the Investment Company Act, 15 U.S.C. § 80a-17, provides in pertinent part:

> "§ 17(a) It shall be unlawful for any affiliated person or promoter of or principal underwriter for a registered investment company (other than a company of the character described in section 80a-12(d)(3)(A) and (B) of this title), or any affiliated person of such a person, promoter, or principal underwriter, acting as principal—
>
> (1) knowingly to sell any security or other property to such registered company or to any company controlled by such registered company . . .
>
> (2) knowingly to purchase from such registered company, or from any company controlled by such registered company, any security or other property . . .
>
> (b) Notwithstanding subsection (a) of this section, any person may file with the Commission an application for an order exempting a proposed transaction of the applicant from one or more provisions of said subsection. The Commission shall grant such application and issue such order of exemption if evidence establishes that—
>
> (1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;
>
> (2) the proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and reports filed under this subchapter; and
>
> (3) the proposed transaction is consistent with the general purposes of this subchapter."

Section 43 of the Investment Company Act, 15 U.S.C. § 80a-42, provides in pertinent part:

> "§ 43(a) Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. * * *"

APPENDIX B

Computation of Adjusted Net Asset Value of Christiana for Merger Purposes

The value of Christiana's security holdings for purposes of the merger was determined as set forth in the following table:

Security	No of Shares	Value	
		Per Share	Total
Du Pont, Common Stock	13,417,120	$163.875	$2,198,730,540
Du Pont, $4.50 Preferred Stock	16,256	69.15	1,124,102
The News-Journal Co., Common Stock	7,460	—	24,260,000
Wilmington Trust Co., Common Stock	69,216	39.00	2,699,424
			$2,226,814,066

Values for Christiana's holdings of Du Pont Common Stock and Du Pont $4.50 Preferred Stock were computed by multiplying the respective number of sha. s held by Christiana by the respective average closing prices on the New York Stock Exchange on July 10 through 14, 1972, inclusive. Value for The News-Journal Co. Common Stock is its estimated fair value based upon an appraisal by Vincent J. Manno, an expert in the field. The value per share for Wilmington Trust Co. Common Stock is based on its average closing bid price in the over-the-counter market on July 10 through 14, 1972, inclusive.

Because Du Pont intends to hold the stock of Wilmington Trust Co. and The News-Journal Co. for only the period required for orderly disposition thereof, the net asset value of Christiana was adjusted for expenses and anticipated tax effect of the disposition of those securities. The adjustment for this purpose reflects the expense (estimated at 3% of market value) to dispose of the Wilmington Trust Co. stock, and federal income taxes at the rate of 30% on the long term capital gains which would result from sale of the two investments at the values thereof used for purposes of the merger.

Christiana and Du Pont will incur certain expenses in connection with the merger, estimated to total $1,500,000, which are to be shared equally by Christiana and Du Pont. Christiana's net asset value was adjusted to reflect its portion of the estimated merger expenses.

The assets of Christiana include a claim pending in the United States District Court for the District of Delaware for refund of federal income taxes and interest, carried on Christiana's books as of June 30, 1972 as a deferred charge in the amount of $11,723,013. As Christiana and Du Pont were unable to determine the fair value of the tax claim, it was treated as having no value, subject to a contingent distribution of Du Pont Common Stock upon settlement of the claim, and $1,000,000 of Christiana's cash was reserved to cover the expense of litigating the claim.

The adjustments described above result in adjusted net asset value as follows:

Security holdings of Christiana	$2,226,814,066
Other assets (at June 30, 1972):	
Cash and cash equivalents, less current liabilities	5,981,367
Deferred charge—claim for tax refund	11,723,013
Total net asset value of Christiana	$2,244,518,446
Adjustments for purposes of the merger:	
Less: deferred charge for the tax claim, together with $1,000,000 for expenses thereof (no present value for merger purpose)	(12,723,013)
Less: estimated expenses and taxes upon disposal of stock of Wilmington Trust Co. and The News-Journal Co.	(7,619,606)
Less: Christiana's share of expenses of merger	(750,000)
Adjusted net asset value of Christiana for merger purposes	$2,223,425,827

A. A714-A715, A720, A731-A736; A. A666-A676

Supreme Court, U. S.
FILED
JAN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners,

v.

RICHARD J. COLLINS, JR., et al.,
Respondents.

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

RICHARD J. COLLINS, JR., et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF RESPONDENT
Richard J. Collins, Jr.

RICHARD J. COLLINS, JR.
314 North Broadway
St. Louis, Missouri 63102
Attorney Pro Se

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	2
Statement of the Case	2
Summary of Argument	6
Conclusion	23

Cases Cited

International Radio Telegraph Co. v. Atlantic Communication Company, 290 F. 698	7
International Radio Telegraph Co. v. Atlantic Communication Company, 290 F. 698	21
Mary A. B. Du Pont, et al. Executors v. Commissioner of Internal Revenue, 38 Bd. Tax Appeals 926 (1938)	17
Paulina Du Pont Dean v. Commissioner, 19 TCM 281 (1960)	17
Pepper v. Litton, 308 U.S. 367 (1939)	10
Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80	8
Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194	8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners,

v.

RICHARD J. COLLINS, JR., et al.,
Respondents.

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

RICHARD J. COLLINS, JR., et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF RESPONDENT

Richard J. Collins, Jr.

OPINIONS BELOW

The opinions below are given correctly in the briefs of the Securities and Exchange Commission (Commission) and E. I. du Pont de Nemours and Company (Du Pont) and Christiana Securities Company (Christiana) heretofore filed with this Court.

JURISDICTION

The jurisdiction of this Court is set forth in the briefs of the Commission and Du Pont and Christiana.

STATUTES INVOLVED

The Statutes involved are set forth in the briefs of the Commission and Du Pont and Christiana.

Question Presented:

Whether the Commission in approving a merger of a controlling investment company into its controlled operating company should value the investment company on the basis of the market value of its assets *as well as* the market value of its own outstanding stock.

STATEMENT OF THE CASE

By way of reference, Respondent will refer to the joint Appendix of the parties as "A" and the Appendix to the Commissions' petition for a writ of certiorari in No. 75-1872 as "Pet. App."

Christiana was organized in 1915 for the sole purpose of controlling Du Pont and has retained such control during all the time thereafter. (A. 39, A. 45). It was organized to serve the interests of its own stockholders. (A. 42).

Both Christiana and Du Pont consistently deny that Christiana controls Du Pont. (A. 43, A. 480, A. 481, A. 566, A. 708).

Over a two year period preceding the merger talks Christiana had sold in the market at a discount of 20% to 25% of its net asset value and had paid income taxes of 7.2%. (A. 25, A. 31).

Mr. Irénée du Pont, Jr., President of Christiana, started the merger talks by a letter to the Chairman of Du Pont in which he wrote that Christiana might be willing to give up the benefits which it had by reason of holding a large block of Du Pont stock. (A. 638).

The President of Du Pont, Mr. C. B. McCoy, gave his 40 shares of Christiana to his grandchildren so as to avoid a ripple in the negotiations. (A. 571).

The Board of Directors of Du Pont, as a group, after allowing for Mr. McCoy's gift of his 40 shares of Christiana, owned 417,624 shares of Du Pont and 606,867 shares of Christiana. (A. 800).

Du Pont appointed two of its officers, Messrs. Charles B. McCoy and Irving S. Shapiro, to represent it in the negotiations. Mr. McCoy had spent his entire business career with Du Pont and was making $272,600 per year. (A. 569, A. 800). Mr. Shapiro had worked for Du Pont since 1951 and was making $193,913 per year. (A. 499, A. 800). Du Pont did not appoint one of its outside directors to negotiate with Christiana. (A. 485).

In the negotiations, the Christiana people pushed for their own interests, and on the other side of the table, Mr. McCoy was representing both Christiana and Du Pont. (A. 599, A. 600).

Each side hired investment bankers to advise on the terms of the deal. The Du Pont negotiators told their adviser, First Boston Corporation, that the *principal advantage* to Du Pont would be freedom from the Investment Company Act's requirements which had delayed and impeded business discussions in the past. (A. 697). First Boston Corporation agreed with this idea.

At this time, Du Pont knew that it had taken one and one half to two employees on a full time basis to comply with the Act's requirements. (A. 853). Mr. McCoy hoped that these regulatory requirements had not cost Du Pont any money or

profits. (A. 598, A. 599). They had not been of earthshaking importance according to Mr. McCoy.

One of the investment advisers, Morgan Stanley and Co., originally thought that Christiana could liquidate itself without the cooperation of Du Pont at a cost of 2.84% of its assets; this should be the highest discount it would accept, and therefore a discount between 0.5% to 2.0% would be fair to both sides. (A. 881, A. 882).

But then it was discovered that as a practical matter Christiana could not liquidate itself without serious unknown tax costs which could run vastly higher than 2.84% of its assets. (A. 445, A. 446, A. 630, A. 631, A. 879). Possibly $300 to $400 millions in taxes.

After Christiana and Du Pont had completed their negotiations, they filed an application for approval by the Commission. The Commission then prepared a six page notice describing the transaction. (A. 24 through A. 33).

The Du Pont Company on October 4, 1972 mailed a copy of this SEC notice to all its 225,000 common stockholders, together with a covering letter from Mr. McCoy. (Note 34 on A. 52; A. 974).

As received by the stockholders, Mr. McCoy's letter was a one page document in front of the attached six page notice from the Commission.

Mr. McCoy's letter said that the stockholders need do nothing at the present time. (A. 974, A. 975).

The SEC notice at its end said that if anyone wanted a hearing on the matter he had to act by October 27, 1972 (A. 32).

The Manufacturers Hanover Trust Company holding Du Pont stock in 361 accounts where it had limited or no voting authority, received the notice and did not send it to its co-fiduciaries be-

cause it believed it did not require any shareholder action. (A. 977).

From its 225,000 stockholders there were 15 replies to the SEC; Du Pont and Christiana opposed a hearing on the matter. (Collins Appendix A-1 to his brief in opposition to certiorari).

At the hearing before the Commission, the applicants produced witnesses who testified that Christiana did not control Du Pont. Among them were:

Mr. Charles Townsend of Morgan Stanley (A. 287, A. 298, A. 299).

Mr. Irving S. Shapiro (A. 480, A. 481).

Mr. Charles B. McCoy (A. 574, A. 597).

At the hearing, both Du Pont negotiators testified they believed the big advantage to Du Pont was something different than what they had told their advisor, First Boston Corporation, during the negotiations. They testified that the big advantage was not the freeing of Du Pont from legal requirements that had hindered it in the past, but rather, it was the freeing it from the possibility of coming under the control of bad or irresponsible persons in the future. (A. 472, A. 473, A. 573).

In the proxy material which is to be sent to the Du Pont stockholders there is no reference to what Messrs. McCoy and Shapiro testified to be the big advantage to Du Pont. The proxy lists other purported advantages. (A. 717).

Mr. Shapiro testified that *as a practical matter* the income taxes being paid by Christiana were not a pressure on Christiana. (A. 489).

The Commission found "Christiana remains in overwhelming measure a du Pont family affair," (A. 44) and there was "the striking disparity between the substantial benefits to be received by Christiana and the far more modest ones inuring to Du Pont." (A. 72).

SUMMARY OF ARGUMENT

The Act is not an insurance policy saying that once a group has taken control of a corporation they have a *right by law* to bail themselves out of their problems at little or no cost by means of a merger with the controlled corporation.

Despite all the testimony and briefs by both sides in this case, the whole matter really boils down to this idea.

Persons who create holding companies to further their own interests must be prepared to face the consequences of their own acts. If they want the benefits, they must be prepared for losses. This is the essence of this case.

Petitioners' view is that they put a given number of shares of Du Pont into Christiana, and now the public stockholders of Du Pont should help them recover essentially the same number of shares.

Respondent's view is that persons who create and enjoy the benefits of a controlling holding company should be prepared for a day of reckoning—that the subservient stockholders should be allowed to bargain as a stranger with the holding company should the opportunity arise.

The Petitioners attempt to phrase the questions before this Court and twist the opinion of the Court of Appeals into making the issue a choice of the market value of Christiana's own stock *or* the market value of its assets. That is to say, they frame the issue as one of either/or, whereas the question is one whether weight should be given to both values.

The Court of Appeals correctly held:

"As we see it, Christiana would have us ignore the market value of its stock in determining reasonableness and fairness.

We cannot do so. Market value, like net asset value, is a factor which must be considered in determining the worth of an investment. The fact that the market value of Christiana stock is affected by the intercorporate dividend tax and unrealized capital gains liabilities is no reason to ignore that value in determining its worth." (Pet. App. 86a)

Respondent believes we should have clear pictures of the true natures of both the merger and Christiana.

In substance, this is a transaction between the dominant and subservient stockholders of the same corporation.

In form, the merger is a transaction between the dominant stockholder and the corporation it controls—but in economic reality the Du Pont Company is not a primary party in interest, rather it is the public stockholders of Du Pont who are the other primary party in interest. The business of the Du Pont Company will not be changed. (A. 66).

Now as to a clear picture of Christiana, the law and common sense say it is in control of Du Pont. (15 U.S.C. 80a-2(a)(9).) Christiana owns 28% of Du Pont, and the remaining 72% is held by some 225,000 stockholders.

If control means anything, it is the election by Christiana of its own candidates as directors and principal officers of Du Pont. It would be impossible to control the company without controlling its directors and principal officers.

By itself, the fact that Christiana controls DuPont does not condemn the merger. But where control by Christiana is used to obtain far more favorable terms than it otherwise could obtain then it is an unfair bargain. International Radio Telegraph Co. v. Atlantic Communication Company, 290 F. 698. This case is in direct conflict with the opinion of the Commission. (A. 62).

Petitioners Du Pont and Christiana deny this control. They admit that Christiana has substantial benefits from its ownership of Du Pont stock. (A. 638).

But if we try to pin them down as to exactly what the benefits are, we hear only that it is potential control.

The Commission has an inconsistent view of Christiana. It sees Christiana as a functionless investment company (A. 39), in control of Du Pont. (A. 45; and page 5 of the Commission's brief). A control device over one of the world's largest industrial complexes is not a functionless investment company. (A. 41).

Christiana must be seen for what it was before and during the negotiations on the merger.

This court held in the two *Chenery* cases that the decision of the Commission must be judged on the grounds upon which the record discloses that the decision was made. If the grounds are not correct, the decision should not be sustained. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80. But if the grounds are rational, the decision must be upheld. *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194.

Respondent maintains the Commission's grounds were irrational and contrary to law. They were as follows:

(1) The terms inflict no detriment on the non-Christiana Stockholders; (A. 61).

(2) Christiana stock and Du Pont stock are economic equivalents; (A. 49).

(3) Net asset value rather than market value of Christiana sets a fair exchange ratio. (A. 38).

(4) The standard of fairness of a transaction between affiliated parties is different than one between non-affiliated parties. (A. 62).

Finally, the Court of Appeals' opinion, contrary to petitioners' claims, had its principal focus on the administrative record and not on Professor Upson's report.

IN SUBSTANCE THE TRANSACTION IS BETWEEN THE DOMINANT STOCKHOLDER AND THE SUBSERVIENT STOCKHOLDERS OF THE SAME CORPORATION.

While in form we have a merger of two corporations, in substance it is a deal between the controlling stockholder on one side and the subservient ones on the other side. The business of the Du Pont company itself will not change. (A. 66). It is only a question of who will own how much of the same pie.

Here we see one group of stockholders against another group of stockholders. Regardless of the form of the transaction, *the Du Pont Corporation itself is not a primary party in interest to the deal.*

The primary parties are Christiana and the public stockholders of Du Pont. The Du Pont company is a party in form only. "In no way will the Christiana merger detract from either the assets or the earning power of that business." (A. 66).

The Christiana people alone chose their representatives, and they were people who by reason of their stock ownership in Christiana had a great deal at stake. (A. 555). No one would suggest that the public stockholders of Du Pont had any say in the selection of the Christiana representatives, nor indeed any right to such.

But then we look to other representatives on the other side of the table. They were men who had risen to high office carrying high salaries during all of which time Christiana had been in control of Du Pont. Christiana controls Du Pont by control of its directors and principal officers. There is no other way it can control Du Pont. Christiana controlled the representatives of the public stockholders.

One of them held 40 shares of Christiana, and to use his own words, in order not to cause a ripple, he gave them to his grandchildren. (A. 571). But neither of these men gave up his salary. They maintain that they had no affiliation with Christiana. (Footnote 18(c), page 27 of Du Pont-Christiana brief).

There is an economic affiliation between the principal officers of a corporation and its controlling stockholder. This can be denied only by looking at form and not at substance. This does not make the principal officers bad men, or good men for that matter. It is simply a recognition of human nature and nothing more.

Mr. McCoy testified that he felt an obligation to look out for the interests of both sides. (A. 600). This is the very practice of serving two masters condemned in *Pepper v. Litton*, 308 U.S. 367 (1939).

The repeated denials by the officials of Du Pont and the investment bankers that Christiana controls Du Pont might be passed off as jokes if the question were not so central to this case.

The fact is that they do not want to talk about the matter of control. Their responses to this question are evasive and hedging. (A. 287, A. 480, A. 481, A. 597).

THE PROPOSED MERGER INFLICTS DETRIMENTS ON THE NON-CHRISTIANA HOLDERS.

An element in the value of any corporate stock is its vote. Other things being equal, voting stock is more valuable than non-voting stock. Voting power is an element of value.

Without a controlling holding company on top of Du Pont, the value of all Du Pont common shares would be the same. If a holding company is in control of an operating company, the

meaning of this control is that the votes of the publicly held stock of the operating company have lost some of their power if, in fact, they have not been made meaningless.

By taking the control away from the public stockholders, Christiana has inflicted a detriment on them.

The Act in saying that the ownership of 25% of the voting stock represents control of a corporation recognizes reality and brushes aside the argument that the public stockholders of Du Pont have their legal right to vote. (15 U.S.C. 80a-2(a)(9).

The Commission says that people have every right to form a controlling holding company. (A. 59). Respondent says that if this is the case, the public stockholders have every right to a defense against an action which can only detract from the value of their stock.

Ruthless people will see if a holding company can be dissolved at little or no cost that they will have everything to gain and little or nothing to lose by creating one.

Respondent states that the proposed merger terms take away a real defense that the public stockholders may have in the future against the formation of a new controlling holding company. This is a detriment.

The 7.2% income tax alone is not a sufficient defense. Mr. Shapiro said in a *practical sense* the tax does not bother Christiana at all. (A. 489).

The fact Christiana has boxed its stockholders into very serious tax problems is certainly a principal cause for Christiana's stock selling at a discount. (A. 50-A. 51). Other things being equal, control stock is worth more than stock which is not in control.

Informed investors are aware of this discount which is certainly a disadvantage to Christiana. And this most apparent

fact very well may have deterred power hungry people from forming other controlling holding companies.

But if the holding company always has the option of the tax free escape route at little or no cost by a merger with its controlled operating company, it will be freed of its most serious tax disadvantage. As a consequence, the discount should be lessened greatly, and there should be considerably less restraint on the creation of holding companies.

But if the public stockholders are allowed to bargain as a stranger with the holding company on its dissolution, people will think twice before organizing a company whose only object is to impair the voting power of the public stockholders.

For this reason the public stockholders of Du Pont should not be satisfied merely with the end of their domination by Christiana—*they should be given the use of a fundamental law of fairness which says that if you set out with the idea of gain, you must be prepared to take a loss.* Otherwise, the public stockholders are sitting ducks for anyone hunting control.

It is inconceivable to believe that Congress in writing the Act at one moment said that the ownership of 25% or more of the voting stock puts one in control of a corporation, and at the next moment wrote an insurance policy protecting those in control against overreaching by the very persons they control. (15 U.S.C. 80a-2(a)(9) and (17(b).)

Congress never intended that the Act should be so construed so as to allow people freely to create and dissolve holding companies according to their own interests and to the detriment of the public stockholders.

Truly, this the heart of the dispute before this court.

The Court may take judicial note of the well-known practice of the Commission to insist that full disclosure to stock-

holders of pertinent facts be given in proxy material. All parties should agree that this is a true and desirable practice.

But what is the purpose of all such effort by the Commission? The answer only can be that the stockholders should be able to vote intelligently for persons best qualified to be directors and on issues requiring stockholders approval.

But why bother to vote if the election is controlled by another party?

The Commission is embarking on a course that can only encourage the diminishment, if not the destruction, of the meaning of the public stockholders' votes. If the Petitioners say that Christiana's sole purpose is something else than the impairment of the voting power of the public stockholders, let them do so.

Respondent is not talking about the legal right of the public stockholders to vote; he is talking about the power, the real meaning of their votes. This cannot be shrugged off as idle speculation without a foundation. The Act itself, in recognizing the possibility of control and defining what constitutes control distinguishes between the legal right to vote and the meaning of the vote.

It is surprising that the Commission with its well-known diligence in working to prevent stockholders from being misled never has said a word about Mr. McCoy's letter accompanying the Commission's notice of the merger.

It never has commented on the fact that Manufacturers Hanover Trust Company, in line with Mr. McCoy's letter, did not notify its co-trustees of the Commission's notice. (A. 974 through A. 977). If the bank was misled, how many plain ordinary stockholders were misled?

His letter without a doubt contained a misleading statement in telling the stockholders that they need do nothing at the

present time. The truth is that if they did not like the deal they had to notify the Commission not later than October 27, 1972. (A. 32).

Furthermore, there is an obvious detriment in forcing the Du Pont company to pay a higher price for all of the assets of Christiana than it would pay for all of the issued common stock of Christiana.

This is shown on page 22 of the Commission's brief where it says that "the net market value of its assets is the minimum selling price because it would normally be economically irrational for the owners to sell for less." But this is only one side of the transaction.

It would be equally irrational for the buyer to pay more for the assets than he would for all of the stock of the corporation which owns the assets.

The idea of a minimum price that Du Pont must pay because it is an affiliate is a particular detriment because there is no corresponding duty on Christiana to sell to Du Pont. Christiana was entirely free to sell to a third party at a higher price, without any obligation to share the proceeds of such sale with Du Pont.

THE TRANSACTION IS NOT AN EXCHANGE OF ECONOMIC EQUIVALENTS.

The Commission holds that the merger is essentially an exchange of economic equivalents. (A. 49).

No one, not even the United States Government in the form of the Securities and Exchange Commission, can say that two stocks are economically equivalent without referring to some standard of measure.

Without a standard, we are judging without reason. The Commission has given no such standard.

The standard of measure in the economic field is money.

If apples sell for eighty cents per dozen, and oranges sell for One Dollar per dozen, they are not economically equivalent despite the fact that both may contain the same amount of vitamins and taste as good as each other. Only when they sell at the same price are they economically equivalent.

Christiana and Du Pont stocks have inherently different characteristics which are reflected in their long standing different market prices.

First, because of the income taxes on holding companies, a given amount of Christiana shares having a net asset value equal to 100 shares of Du Pont common cannot pay the same dividend as 100 shares of Du Pont. The Christiana dividend has to be reduced by the 7.2% income tax paid by Christiana, whereas, the dividend on 100 shares of Du Pont is not reduced by a holding company tax. Stocks paying different dividends are not economically equivalent.

Second, the voting power of a given amount of Christiana shares having a net asset value equal to 100 shares of Du Pont common has a far greater power than the voting power of 100 shares Du Pont common. This is the fundamental principle of the holding company concept.

Control of the holding company can be had with fewer votes and this, in turn, gives control of Du Pont. Therefore, a given number of shares of Christiana with a net asset value of 100 shares of Du Pont represents an entirely different voting power than what is contained in 100 shares of Du Pont common. Stocks with different voting powers are not economically equivalent.

The fact that over a continuous period of years the market value of Christiana has been at a 20 to 25% discount from its net asset value is a recognition of these two elements, plus recog-

nition of the tremendous taxes to be paid if Christiana liquidated itself. (A. 51).

On the day before the merger negotiations were announced, Christiana was selling at $147.00 per share and Du Pont at $168.25 per share. (A. 199, A. 200). As Christiana's net asset value was essentially 1.15 shares of Du Pont common, it had a net asset value of 1.15 times $168.25, or $193.49 per share.

If, in fact, the two stocks were economic equivalents, the Treasurer of Du Pont would have been justified in paying up to $193.49 in the over-the-counter market for one share of Christiana, and offsetting the transaction by selling 1.15 shares of Du Pont common out of its treasury on the Stock Exchange.

Later, when the outside auditors would ask him what he had been doing on April 28, 1972, he would reply that he had been simply obliging one of the Christiana people at no cost to the company, for after all, it received 1.15 shares of its own stock in exchange for 1.15 shares. This reasoning very well could be taken right from the Mad Hatter's Tea Party because he would not have been measuring the two stocks by the correct yardstick, namely dollars and cents.

Only if we are going to change economic reality by changing the tax laws, by changing Christiana from a closed end investment company to an open end investment company in which a stockholder is free to exchange his stock for a pro rate share of its assets—only then can we say that Christiana stock and DuPont stock are economic equivalents.

Christiana stock would be the economic equivalent of its net asset value only if it could freely be exchanged for 1.15 shares of Du Pont without charge.

The Christiana holders are free to liquidate their corporation subject to tremendous income taxes.

Is anyone going to say that income subject to taxation is the economic equivalent of income free of taxation? The same amount of income from tax free bonds is economically different than the same amount from taxable bonds.

Property which is subject to taxation, as would be the case if Christiana were to liquidate itself, is not economically equivalent to property which is free of taxation as would be the case in this merger.

NET ASSET VALUE *AND* MARKET VALUE OF CHRISTIANA SET A FAIR EXCHANGE RATIO.

Now Christiana insists that it be paid almost net asset value by its controlled corporation.

Only when Christiana has its controlled corporation as a possible buyer, do we hear Christiana talking about its net asset value. Consider how the present stockholders of Christiana acquired their stock. It could have been by:

1. Inheritance.
2. Gift.
3. Purchase on the over-the-counter market.

If he acquired it through inheritance or gift, taxes were not paid on net asset value. *Mary A. B. Du Pont, et al. Executors v. Commissioner of Internal Revenue,* 38 Bd. Tax Appeals 926 (1938). *Paulina Du Pont Dean v. Commissioner,* 19 TCM 281 (1960). These cases recognize the economic reality of the value of Christiana stock. The stockholders in these cases were realistic about net asset value.

Nobody, including the Commission, would claim that the transactions made in the over-the-counter market were unfair because they were at a discount from net asset value. Of course,

if we believe "Arm's length bargaining is at best a crude and inexact method of determining fairness" (Du Pont Christiana brief pages 27-28) the open market transactions were unfair.

But now when those in control are dealing with their controlled corporation as a possible purchaser, suddenly net asset value is said to be the only fair price.

Certainly this is a double standard.

Respondent can sell his Du Pont stock on the New York Stock Exchange and with the cash buy Christiana at a discount in the over-the-counter market.

In economic reality he is trading his Du Pont stock for Christiana stock according to a ratio set by market prices.

In principle it is the same as though he had made a direct exchange with a Christiana holder, giving him Du Pont stock for Christiana stock.

Petitioners cannot refute this statement.

But now when the Du Pont corporation is going to deal with the Christiana stockholders we have an entirely different ratio of exchange.

Somehow, the Commission holds that the controlled party Du Pont must exchange at a more favorable ratio than the controlling stockholder can find in the open market.

Page 17 of the Commission's brief talks about the danger of profits to insiders. The public stockholders of Du Pont in this merger cannot be turned into insiders and Christiana into an outsider.

On page 24 of the Commission's brief the Christiana stockholder are described as "disadvantaged investors." In view of the ownership of Christiana, with 95% of its stock held by some 338 people, it is difficult to see the world of Christiana as a

group of disadvantaged investors. (A. 44). How can control for over 50 years of "one of the world's greatest industrial complexes" (A. 41) be said to have produced a group of disadvantaged investors?

If the law gives the stockholders of a controlling holding company the right to a merger with its controlled corporation on essentially a net asset basis, we have a one way street in favor of the holding company at the expense of the public stockholders. For the holding company it is clearly "Heads I win," and for the public stockholders, "Tails you lose." This is overreaching the public stockholders.

TEST OF FAIRNESS OF THE TERMS IS WHETHER THEY WOULD HAVE APPEALED TO TWO NON-AFFILIATED PARTIES.

The Commission says that *the law* prohibits Du Pont from bargaining for better terms. (A. 62; page 29 of its brief).

Du Pont and Christiana are more explicit in their brief saying that arm's length bargaining is at best a crude test of fairness; that neither of them could act in the spirit of a pawn broker. (Pages 27, 28, Du Pont-Christiana brief).

If "arm's length bargaining is at best a crude and inexact method of determining fairness," why did they conduct the negotiations so that they would have the earmarks of an arms length bargain? (Note 18, page 26, of Du Pont-Christiana brief; A. 91).

In a free economy, as opposed to a state controlled one, every day business transactions are conducted by arm's length bargaining. Du Pont's and Christiana's judgment on arm's length bargaining is just plain wrong.

Why should Du Pont and Christiana condemn "the law of the commercial and financial jungle?" (Page 28, Du Pont brief).

Under what law did they organize Christiana for the sole purpose of dominating the public stockholders of Du Pont and do so for fifty years?

If they were not free to bargain in the spirit of a pawnbroker, why did they hire three investment bankers to give advice? The business predecessors (not necessarily the family forebears) of the investment bankers were goldsmiths and pawn brokers.

Today, a loan of $25.00 is made by a pawn broker; a loan of $2,500.00 by a banker; a loan of $25,000,000.00 by an investment banker. The business of all three of them is the same —lending money. It is only a question of how much money.

The Commission claims that a striking disparity of benefits, (A. 72) in a deal between the strong and the weak, is not overreaching where the strong gets the lion's share. Respondent says that a striking disparity of benefits in favor of the stronger party is overreaching.

If that is not overreaching, what is overreaching?

The disparity in benefits between the party in control and the subservient is at least eight to one. (Du Pont Christiana brief pages 6 and 7) Christiana gets $450 million and Du Pont gets $55 million). This is a gross imbalance.

If we look at the merger results on one share of Christiana and one share of Du Pont, the benefits are fantastically greater than eight to one in favor of Christiana. The table (at A. 202) shows that Christiana per share receives considerable increases in everything that really matters; namely, earnings per share, dividends and market value. Du Pont receives only an increase in earnings of 4 cents per share on an annual basis, from $7.33 to $7.37 which is less than 1%.

Therefore, to be conservative, and using only the eight to one advantage, would any one say that two strangers, ***neither***

of whom was legally obligated to make a deal, would strike such a bargain?

The Commission admits that strangers would not have done so but comes up with a rule of law, without precedent or reason, that because they are affiliated the deal is fair. (A. 62) And they are affiliated only because Christiana was formed for the sole purpose of controlling Du Pont.

The gross imbalance of 8 to 1 in favor of the controlling party is supposedly justified by saying, "some transactions are more important to one side than to the other. This is one of that type." (A 59)

Why is this transaction more important to one side than to the other? As the sole purpose of the merger is to make money for stockholders, it is arbitrary for the Commission to say that the merger is more important to one side than the other. Money is as important to the public stockholders as it is to Christiana.

This is a most arbitrary stand by the Commission.

It is contrary to common sense justice—something akin to Louis XIV's statement, "I am the State." No one could question him.

It is openly contrary to the standard of fairness set for affiliated companies in *International Radio Telegraph Co. v. Atlantic Communication Company*, 290 F. 698.

That case held that the test of fairness of a contract between two affiliated companies is whether it would appeal to two non-affiliated companies.

That case held:

> "A fair way to determine the question (of validity of traffic contract) is to consider whether the proposition sub-

mitted would have commended itself to an independent corporation. If to such a corporation the proposition would not have seemed unfair or unconscionable, a court should not be inclined to condemn the agreement merely because one party to it controlled the other." *International Radio Telegraph Co. v. Atlantic Communication Company*, 290 F. 698, 702.

The Act did not set aside this standard, and the Commission has no right to do so.

There is no way on earth that we can reconcile the standard used in International Radio Telegraph, supra, with the Commission's view that because Du Pont and Christiana are related a different test of fairness should apply.

The merger terms are not condemned simply because Christiana was in control—the terms are condemned because the Commission admits they would not have been accepted by an independent corporation. (A. 62).

Christiana used its control of Du Pont and Du Pont's principal officers to obtain better terms for itself than could be obtained otherwise.

The Act demands fairness. It is impossible to reconcile the finding "the striking disparity between the substantial benefits to be received by Christiana and the far more modest ones inuring to Du Pont" (A. 72) with a fair deal for both sides.

THE FOCAL POINT OF THE COURT OF APPEALS DECISION WAS THE ADMINISTRATIVE RECORD AND NOT PROFESSOR UPSON'S REPORT.

The Petitioners argue that the procedure of the Court in appointing Professor Upson as a contract consultant and putting various questions to him violated proper judicial review in this matter.

The foundations of the Court of Appeals' opinion should be the law as well as the evidence produced in the administrative record of the Commission.

The Commission itself stated that the questions presented by this merger application are essentially legal ones.

The Court in appointing Professor Upson specifically directed that he was not to advise the Court on the fairness of the merger terms.

The Professor's report did not become the principal focus of the opinion of the Court of Appeals.

Respondent states that a thorough reading of the opinion of the Court of Appeals shows that its principle focus was on the evidence produced in the administrative record.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

RICHARD J. COLLINS, JR.
314 North Broadway
St. Louis, Missouri 63102
Attorney Pro Se

Supreme Court, U. S.
FILED
JAN 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Petitioners,

vs.

RICHARD J. COLLINS, JR., ET AL.,
Respondents.

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

vs.

RICHARD J. COLLINS, JR., ET AL.,
Respondents.

BRIEF OF RESPONDENT, LEWIS C. MURTAUGH, TRUSTEE FOR EMMANUEL AND HELEN STEIB, UNDER DECLARATION OF TRUST DATED 8/30/56.

LEWIS C. MURTAUGH,
TIMOTHY J. MURTAUGH III,
MURTAUGH, NELSON & SWEET,
105 West Adams Street,
Chicago, Illinois 60603,
Attorneys for Lewis C. Murtaugh, Trustee, as Above Described.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

	PAGE
Opinions Below and Jurisdiction	1
Statutes Involved	2
Question Presented	2
Statement of the Case	3
Summary of Argument	3
Argument	8
I. Fiduciary Self-Dealing Requires Arm's Length Results	8
II. In a Merger of a Controlling Investment Company Into a Controlled Affiliate the Usual Fiduciary Standard That the Transaction Bear the Earmarks of an Arm's Length Bargaining Result Is Applicable	11
(a) This Is True, Construing the Statute Itself	11
Overreaching	16
Consideration Paid and Received	17
(b) Legislative History Supports the Continued Vitality of Requiring an Arm's Length Bargaining Result, a Vitality in No Way Impaired by *Chenery II*.	18
(c) The Commission Precedents Do Not Justify Ignoring, as a Matter of Law, All Factors Except Net Asset Value	23
(d) The Commission's Opinion Disregards DuPont's and DuPont's Shareholders' Legitimate Interests in an Arm's Length Bargaining Result, Including Sharing in the Incremental Values of the Merger, in This Fiduciary Context	29
III. Market Impact Is of Great Relevance and Importance in This Matter, Although Possibly a Superfluity	33
(a) Commission Studies	33

(b) The General Motors Divestiture Litigation Evidence 35
(c) Consequences of Impact 37
(d) Detriment to DuPont as a Company ... 38
(e) "Long-Term Investors" Concepts or Verbiage Add Nothing Here 39
(f) Misapprehension of the Court Below .. 41

IV. The Commission's Opinion Asserts Economic Realities and Equivalences Which Are Not Real, Ignores Other Realities, and Erroneously Arrives at and Sanctions a Division of Increased Values Which Is Not Fair 43
Tax Factors Are Not the Reason for Christiana's Market Price Being So Far Below Net Asset Value 49

V. A Number of Relevant Factors Should Be Considered 53
(a) Possibly This Is the Most Incremental and Synergistic Merger in History 53
(b) The Right to Share in Tax Savings of One Party to a Merger Has Recently Been Strongly Supported 54
(c) Misuse of "Value" in Various Contexts Colors This Case 56
(d) An Important Article on the Valuation of Freely Traded Shares Sheds Light on This Matter 56
Blockage and Restrictions 58
(e) The Commission's Evaluation of Dispersion as Valueless Is on Solid Ground 60
(f) This Is Not a Liquidation Nor An Exchange of Equivalents 61
(g) Harmless Error, if Any, Was Involved in Dean Upson's Appointment 63
(h) *Harriman* v. *DuPont* Discussion 64

VI. This Cause Should Not Be Remanded Unless Lack of Proof of Market Impact Is Critical to Its Disposition 65

VII. This Merger Cannot Be Sustained on Evidentiary Grounds but a Rejection of It Can Be 67

VIII. The Merger Terms Are Patently Not Balanced at All and Are Unfair on Their Face 69

Conclusion 71

Appendix A A1

Appendix B A2

CITATIONS.

Cases.

Addison v. Holly Hill Fruit Products (1944), 322 U. S. 607 13

Blue Chip Stamps v. Manor Drug Stores (1975), 421 U. S. 723 .....12, 13

Henry F. DuPont v. Commissioner (1943), 2 Tax Court 246 58

Ernst & Ernst v. Hochfelder (1976), 96 S. Ct. 1375..12, 13, 65

Federal Power Commission v. Texaco Inc. (1974), 417 U. S. 380, 397 67

Harriman, et al., v. E. I. duPont de Nemours & Co., et al. (D. Del., Dec. 23, 1975), 411 F. Supp. 133 .....64, 68

International Radio Telegraph Co. v. Atlantic Communications Co. (2 CCA, 1923), 290 F. 698 .....8, 25

Investment Company Institute v. Camp (1971), 401 U. S. 617, 627-8 67

Kern County Land Company v. Occidental Petroleum Corp. (1973), 411 U. S. 457, 594 17

Morgan Stanley & Co. v. Securities and Exchange Commission (2 CCA 1942), 126 F. 2d 325, 332 .....19, 21

Natural Gas Pipeline Co. v. Slattery (1937), 302 U. S. 300 9
Pepper v. Litton (1939), 308 U. S. 295, 306-7 ....10, 24, 29
Schoenbaum v. Firstbrook (en banc 2 CCA 1969), 405 F. 2d 215, 219 10
Securities and Exchange Commission v. Chenery Corp. (1943), 317 U. S. 80 22
Securities and Exchange Commission v. Chenery Corp. (1947), 332 U. S. 194 21
Securities and Exchange Commission v. Sterling Precision Corp., 393 F. 2d 214, 220 (2nd Cir. 1968) 28
Superintendent of Insurance of the State of New York v. Bankers Life & Casualty Co. (1971), 404 U. S. 6, 12.. 10
United States v. DuPont, et al. (N. D. Ill. 1959), 177 F. Supp. 1 .....5, 30, 35
United States v. DuPont, et al. (1961), 336 U. S. 316...36, A2
United States v. National Association of Securities Dealers (NASD) (1975), 422 U. S. 694, 711-2 15
Willheim v. Murchison (2 CCA 1965), 342 F. 2d 33, 42, Cert. den. 382 U. S. 840 .....13, 15

Administrative Agency.

Atlas Corporation (1956), 37 SEC 72, 85-86..... 24
Central States Electric Corporation (1949), 30 SEC 680. 27
Deleware Realty & Investment Company (1961), 40 SEC 469, 473 27
Harbor Plywood Corp. (1962), 40 SEC 1002, 1010 26
International Mining Corporation (1956), 37 SEC 209... 25

Statutes.

Internal Revenue Code of 1954, 26 USC §§ 1, *et seq.*:
26 USC § 301(f) 36

26 USC § 333 .....55, 68
26 USC § 1111 36
Investment Company Act of 1940, 15 USC §§ 80a-1, *et seq*:
15 USC § 80a-1(a)(3) 12, 13, A1
15 USC § 80a-17(a) 4, 12, 18
15 USC § 80a-17(a)(1) 18
15 USC § 80a-17(b)(1) 4, 12, 14, 15, 18, 22, 66, 69
15 USC § 80a-17(b)(2) 13
15 USC § 80a-17(d) 14, A1
15 USC § 80a-22 28
15 USC § 80a-22(f) 15
Securities Act of 1933, 15 USC §§ 77a, *et seq.*:
15 USC § 77a 39
Securities Exchange Act of 1934, 15 USC §§ 78a, *et seq.*:
15 USC § 78j(b) (Section 10b) 11
Public Utility Holding Company Act of 1935, 15 USC §§ 79 *et seq.*:
15 USC § 79a 18, 19, 21
15 USC § 79b(a)(11)(D) 19
15 USC § 79z-4 22

Administrative Rules.

Rule 10b-5 Issued Under Securities Exchange Act of 1934, 17 CFR 240.10b-5 .....12, 65
Rule 144 Issued Under Securities Exchange Act of 1933, 17 CFR § 230.144 .....40, 54, 59, 70

Legislative Material.

Securities and Exchange Commission Report on Investment Trusts and Investment Companies, Part Three, H. R. Doc. 279, 76th Cong., 1st Sess. (1939) at page 1411 .. 23

Securities and Exchange Commission, "Public Policy Implications of Investment Company Growth", H. R. Report No. 2337, 89th Cong., 2nd Sess. (1966) 34, 60

Wharton School of Finance and Commerce, "A Study of Mutual Funds," Report of the Committee on Interstate and Foreign Commerce, H. R. Report N. 2274, 87th Cong., 2nd Sess. (1962) 33, 34

Other Authorities.

Black's Law Dictionary 8

Boudreaux, Kenneth J., "Discounts and Premiums on Closed End Mutual Funds" (May 1973, 28 *Journal of Finance* 515-522) 51

Brudney and Chirelstein, "Fair Shares in Corporate Mergers", 88 *Harvard Law Review* 297 (December 1974) 25, 32, 61

Business Week (July 29, 1976), p. 54 38

Business Week (June 28, 1976), p. 86 51

Harvard Law Review, Case Comment, "Fairness Standards for SEC Approval: Collins v. SEC" (December 1976), Vol. 90, pp. 453-462 .....16, 31, 52, 54, 55, 56

Kripke, "A Search for a Meaningful Disclosure Policy", *The Business Lawyer* (A. B. A.) 293, 305-6 40

Langbein and Posner, "Market Funds and Trust Investment Law", Volume 1976, No. 1, *American Bar Foundation Research Journal,* page 1 40

Wall Street Journal ,"Shenandoah Oil Ends Merger Talks with DuPont", July 12, 1976, page 6 38

Watts, David E., "The Fair Market Value of Actively Traded Securities", *The Tax Lawyer* (A. B. A.) Fall 1976, pages 51-84 .....6, 56-59

Webster's Third International Dictionary (G. & C. Merriam Co. 1961) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1870.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Petitioners,

vs.

RICHARD J. COLLINS, JR., ET AL.,
Respondents.

No. 75-1872.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

vs.

RICHARD J. COLLINS, JR., ET AL.,
Respondents.

BRIEF OF RESPONDENT, LEWIS C. MURTAUGH, TRUSTEE FOR EMMANUEL AND HELEN STEIB, UNDER DECLARATION OF TRUST DATED 8/30/56.

OPINIONS BELOW AND JURISDICTION.

The opinions below and jurisdiction as stated in the DuPont-Christiana Petition (hereafter the D-C Petition) are accepted.

STATUTES INVOLVED.

The D-C Petition sets forth the most important parts of the Investment Company Act of 1940 but in Appendix A hereto this Respondent adds Section 1(a)(3) of the Act (15 U. S. C. §§ 80a-1(a)(3)) of the Act and Section 17(d) of the Act (15 U. S. C. §§ 80a-17(d).)

QUESTION PRESENTED.

The D-C question presented uses the word "reflect" twice—once to describe the Commission's decision to accept net asset value as controlling and the second time to describe the Court below's decision as requiring Christiana's market value to control. The SEC question presented uses "reflecting" only once, but clearly projects the same concept as the D-C Petition. Was the Commission right "in valuing the investment company *essentially* on the basis of the market value of its holdings which constituted substantially all of its assets, *rather than* on a basis reflecting substantially lower market value of its own outstanding stock." (Emphasis supplied).

No such issue is presented in this case. There is no dichotomy of net asset value or market value of Christiana shares. The Court's Opinion did not insist on giving Christiana's share of market value controlling significance but did insist on the necessity of taking Christiana's share market value as a factor into account as well as its net asset value (Pet. App. 54a, 56a, 57a, 58a, 61(a), 62a, 65a, 68a, 71a, 72a) (not to mention other factors). The question presented is therefore restated:

Was the Commission correct as a matter of law in holding that the Investment Company Act of 1940 requires that, in a merger of a controlling investment company into a controlled subsidiary, the exclusive inquiry by the Commission, as to the fairness of the merger ratio, should be whether the investment

company shareholders are receiving the net asset value of their shares.

STATEMENT OF THE CASE.

The Opinion below's statements of facts and of the case and the opinion itself is adopted with two reservations. See pages 41 and 60. To understand the Memorandum Opinion and Order Denying Rehearing and Leave to Adduce Additional Evidence (Pet. App. 40a), this Respondent's Supplemental Petition (A. A204-223) is important.

SUMMARY OF ARGUMENT.

DuPont is controlled by Christiana. Both the Majority and Dissenting Opinions agree that there was an absence of arm's length bargaining and that only limited weight could be given to the recommendations of the financial advisors (Pet. App. 97a, f. 7). The Commission's Opinion states that "the questions in our view are essentially legal" (Pet. App. 17a, f. 38).* It further states that its Opinion "rests on our reading of the Act, hence additional evidence cannot alter the result." (Pet. App. 42a). The footnote 6 following states:

> "Petitioner recognizes this. He says in his Petition: 'Reading the opinion of the Commission leaves the impression that there is no fact question that could move the Commission to abandon the legal rulings which seem to preclude and indeed preempt factual issues . . . there is little that can be done by way of evidence.' "

So, in the Commission's view, once it is settled that marketable securities are the assets of an investment company, that is the end of evidentiary detail. The ratio in a merger, even though the investment company controls both sides, *must* be based on net asset value as a matter of law. This Respondent's argument is that Christiana controlling DuPont, has a fiduciary duty in a

* The Commission did not purport to be exercising its discretion; it viewed itself as interpreting the law (Pet. App. 42a, footnote 5).

sale barred by Section 17(a), which has been construed to include a merger, to take into account the well-established norm that fiduciary self-dealing requires arm's length results. The exemption that is permitted from the absolute bar of Section 17(a) by reason of the provisions of Section 17(b)(1) is not only consistent with the fiduciary self-dealing standards, but is actually required by Section 17(b)(1). At the very least, it is not negatived by it. The legislative history of the Act, and the Commission's precedents support the view, carefully expressed by DuPont's own counsel, that net asset value is only one factor, not a single controlling factor (Pet. App. 53a, f. 12). The main thrust of the argument of this Brief, however, is that Section 17(b)(1) does not eliminate the necessity for finding the earmarks of arm's length bargaining in a fiduciary self-dealing involving a merger of a controlling investment company into a controlled affiliate.

If the foregoing argument is accepted, it should be superfluous to argue that there is positive detriment to DuPont shareholders (other than Christiana) because of the likelihood that the vast increase in the floating supply of DuPont which is made possible by this consensual transaction—thirteen and a half million shares (39%)—should be reflected in the ratio because of the market impact which will follow as a result of the now made possible sales of new DuPont shares. At best the Commission's treatment of this is in the nature of a demurrer. The Commission said it rejected market impact evidence "because we think such selling is irrelevant to the fairness issue." (Pet. App. 42a) and "because as a matter of law evidence on the probability of market impact would have swelled the record pointlessly" (Pet. App. 36a, f. 63). "Evidentiary details" were not involved in the Commission's holding (Pet. App. 42a).

Assuming the "earmarks of an arm's length bargaining result" concept are to be disregarded in this fiduciary-controlled consensual transaction, market impact considerations do require consideration. Commission studies show great concern about

market impact from the marketing of large blocks of stock. Evidence produced by DuPont and Christiana in earlier litigation involving the adverse effect of large sales of General Motors shares in the General Motors divestiture case (*U. S.* v. *DuPont* (1959), 177 F. Supp. 1) showed that a lesser tax free distribution percentage-wise of shares would have a ten-to-fifteen percent market effect lasting, until the distribution of General Motors shares was completed, from a program of selling .7% of General Motors shares a year over a period of ten years, postponable in bad years. In addition, there would be, here, detriments to DuPont as a company if the price of its shares were depressed in the event it had to raise new capital or wished to use its shares in an acquisition. The Court below recognized that it was error for the Commission not to take market impact into account, but, because of a misapprehension as to the size of secondaries that were provided for in the Registration Agreement, assessed the detriment as minimal.

Moreover, apart from the Act, the misstated economic realities and equivalencies, and the ignoring of other realities cannot be considered to result in a fair transaction. One of these realities is that tax factors are not the reason for Christiana's market price being so far below its net asset value.

There are a number of identifiable factors which support this Respondent's contention. The merger (like all other mergers, hopefully) does produce an incremental and synergistic effect which is truly spectacular, not only in terms of the half billion dollar increase in the market price of Christiana shareholders' holdings, but also in the equally valuable, but not so easily quantifiable, vastly increased marketability in the auction market, in block sales, and in secondary registration rights. In addition, of course, enabling Christiana to get all of these advantages tax-free requires DuPont's consent, which, in business relationships, is not gratuitously dispensed.

Much of the argument in support of alleged values is based on inexact terminology and specious reasoning. A product of

this type of reasoning is an untenable Commission conclusion (Pet. App. 32a):

> "An investment company, whose assets consist entirely or almost entirely of securities the prices of which are determined in active and continuous markets, can normally be presumed to be worth its net asset value."

That even the "fair market value of actively traded securities" cannot be assumed to be their market price in situations involving large holdings is strongly supported by a recent important study (see *Watts*, page 56, *infra*). The S. E. C. Petition ceaselessly tries to substitute the concept of a liquidation, which would not require consent, and both parties distort the Commission's Opinion to state that it "found" that that was involved was "an exchange of equivalents." The Commission made no such finding.

There was no error in the appointment of Dean Upson, it is submitted. The Court was entitled to guidance in economic matters, since the Commission refused to supply any, based on its interpretation of the controlling law. The Court could have gone to publicly available economic sources. It chose more fairly to seek help in this area in which it was inexperienced, gave notice of its intention, provided a copy of the report for comment, and then used it but slightly in its conclusions.

It is further argued that because of the striking disparity of the benefits which the Commission's Opinion details at great length, that there is no possible basis for sustaining the Opinion unless the Commission holding as a matter of law, that the Act mandates net asset value and requires Christiana to have a ratio which ignores its market value and also requires ignoring the vast incremental benefits, financial and otherwise, which will result from this transaction. However, even if the Commission is right in its interpretation of the law, so far as eliminating the need for arm's length bargaining and fair allocation of the benefits of the transaction, the question of market impact detriment should intervene to require a remandment to obtain evidence to define the probabilities in this respect.

The Court below went on in Section III of its Opinion to discuss reasons why the record as a whole does not support the Commission's general finding that the merger terms were reasonable and fair (Pet. App. 73), recognizing, in footnote 24 that "we might ignore the question on the theory that the Commission had not clearly focused on it because of its erroneous view of the law."

This Brief is very much extended by reason of the Court's decision to do this, but the evidence that is reviewed does demonstrate that although this merger cannot be sustained on evidentiary grounds, since the Commission based it on statutory grounds, a review of it can be based on the record as a whole.

A thumbnail one-page description of the benefits and detriments of the merger closes the argument (see page 70 *infra*).

Central to the argument, in many places, is the present and future holdings of Christiana shareholders. As the Court stated (Pet. App. 46a), 95.5% of all Christiana stock is held by 338 holders of 1,000 or more shares each. This indicates an average holding of around 35,000 shares. In the testimony of Mr. Shapiro, there is a further breakdown, that 132 of these holders hold over 5,000 shares each (A. A512). Assuming that the 206 shareholders who own less than 5,000 shares each held in fact 5,000 shares, that would still leave 132 holders of over 90% of the shares with an average holding in excess of 75,000 shares with a market price "value" of over $14 million dollars in new DuPont shares, a boost of about $4 million dollars apiece above the market price "value" of their Christiana shares prior to the merger announcement.

ARGUMENT.

I.

FIDUCIARY SELF-DEALING REQUIRES ARM'S LENGTH RESULTS.

Was there such arm's length bargaining or a resultant agreement which is equivalent thereto as is required by law in fiduciary or interlocking self-dealing matters? It is respectfully submitted that the answer to the stated question is in the negative. The SEC Petition seems inclined to agree, if this were a case involving unregulated companies. For the convenience of the Court, we assemble here some of the references and authorities dealing with the concept of an arm's length negotiation or bargaining or judging the results thereof by an arm's length bargaining standard.

In *Webster's Third International Dictionary (G. & C. Merriam Co. 1961)* "arm's length" is defined as:

> "The condition or fact that the parties to a transaction or negotiation are independent and one does not dominate the other. (sale at arm's length) (arm's length bargaining)."

In *Black's Law Dictionary* under the heading "at arm's length" it is stated:

> "Parties are said to deal at arm's length when each stands upon the strict letter of his rights and conducts the business in a formal manner, without trusting to the others fairness or integrity, and without being subject to the others control or overmastering influence."

In *International Radio Telegraph Co.* v. *Atlantic Communications Co.* (2 CCA, 1923), 290 F. 698, the Court said:

> "This brings us to consideration of the legality i.e. validity of the traffic agreement. The relation between a controlled and controlling corporation is sufficiently and instructively set out in Noyes on Intercorporate Relations (2d Ed)

> ¶ 300. The controlling corporation assumes a trust relation to the minority shareholders of the corporation controlled. That is, it is through the right of the minority shareholders of the controlled corporation that the equities of the rest of the world are worked out.
>
> The decisions relied on by plaintiff are fairly illustrated by Rubber Co. v. Goodyear, supra, and Bush v. Becker, 234 Fed. 79, 148 C.C.A. 95; where, in respect of accounting for profits derived from infringements, the courts refused to permit as proper expenses in diminution of profits exorbitant salaries paid to officials of the infringing defendants. Undoubtedly items of expenses may be looked into; the bald fact of payment by an infringing defendant under the title of expense is not enough.
>
> Thus to the legal rule stated by the learned master we give adherence, viz:
>
> 'A fair way to determine the question (of validity of traffic contract) is to consider whether the proposition submitted would have commended itself to an independent corporation. If to such a corporation the proposition would not have seemed unfair or unconscionable, a court should not be inclined to condemn the agreement merely because one party to it controlled the other.' "

In *Natural Gas Pipeline Co. of America* v. *Slattery* (1937), 302 U. S. 300, the Court said (at pages 307-8):

> "This Court has often recognized that the reasonableness of the price at which a public utility company buys the product which it sells is an appropriate subject of investigation when the resale rates are under consideration, and that any relationship between the buyer and seller which tends to prevent arm's length dealing may have an important bearing on the reasonableness of the selling price. (Citing cases) We have not said, nor do we perceive any ground for saying, that the Constitution requires such an inquiry to be limited to those cases where common control of the two corporations is secured through ownership of a majority of their voting stock. We are not unaware that, as the statute recognizes, there are other methods of control of a corporation than through such ownership. Common

management of corporations through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its term is the subject of inquiry. In these circumstances, appellant can hardly object to the attempted inquiry into the fairness of the price." (Citing cases)

In *Pepper* v. *Litton* (1939), 308 U. S. 295, the Court said (at pages 306-7, emphasis supplied):

"A director is a fiduciary. Twin-Lick Oil Company v. Marbury, 91 U.S. 587, 588. So is a dominant or controlling stockholder or group of stockholders. Southern Pacific Company v. Bogert, 250 U.S. 483, 492. Their powers are powers in trust. See Jackson v. Ludeling, 21 Wall. 616, 624. Their dealings with the corporation are subject to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. Geddes v. Anaconda Copper Mining Company, 254 U.S. 590, 599. *The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain.* If it does not, equity will set it aside."

Pepper v. *Litton* is one of the most frequently cited Supreme Court cases. There are 7½ columns of citations in Shepard's Citator for the years 1943 to 1961. It was cited, not long ago, on the point of the fiduciary obligation of a controlling shareholder to the corporation, its creditors and its shareholders. *Superintendent of Insurance of the State of New York* v. *Bankers Life & Casualty Co.* (1971), 404 U. S. 6, 12.

In *Schoenbaum* v. *Firstbrook* (en banc 2 CCA 1969), 405 F. 2d 215, 219, two mergers were involved. In one there were no conflicting interests among the merging companies and the Court refused to interfere because the terms were the result of

arm's length bargaining. In the other where a marked advantage accrued to the controlling interest, the Court sustained the challenge to the merger.

II.

IN A MERGER OF A CONTROLLING INVESTMENT COMPANY INTO A CONTROLLED AFFILIATE THE USUAL FIDUCIARY STANDARD THAT THE TRANSACTION BEAR THE EARMARKS OF AN ARM'S LENGTH BARGAINING RESULT IS APPLICABLE.

(a) *This is true, construing the statute itself.*

Both Petitioners' briefs seem to find it necessary to urge that the principles set forth in the preceding section of this brief are not applicable to transactions between a controlling investment company and a controlled affiliate but that the concept of honoring the net asset value as the *single* controlling consideration in fixing the merger is required as a matter of law. The Court's Opinion at pages 53a-58a strongly rebuts this position, and of course the advice the counsel for Du Pont gave each of the financial advisors set forth at Footnote 12 of the Court's Opinion (Pet. App. 53a) is contrary, especially the last sentence, *"No single factor has been considered determinative."* (Emphasis supplied). Mr. Shapiro, one of DuPont's negotiators, thought that it was critical to emphasize this statement in the cross-examination centered around the footnote (A. A 500). Evidently he little thought, nor did anyone else, including the Commission staff, that the Commission would find that the "single factor" of net asset value was an answer as a matter of law.

Commentators read the tenor of the opinions of the present majority of this Court in its interpretations of the scope of Section 10(b) of the Securities Exchange Act of 1934 (15 USC Section 78j(b)) as eliminating fairness as a consideration in suits under that Section unless there is manipulation, deception or fraud. The inclination is to construe congressional in-

tent strictly and to remit causes lacking these characteristics, for example, causes just based on fully-disclosed alleged abuse of control, or not involving a purchase or sale, literally construed, to state court remedies, without judging them fair or unfair. *Blue Chip Stamps* v. *Manor Drug Stores* (1975), 421 U. S. 723 at footnote 18. As the Court pointed out in *Ernst & Ernst* v. *Hochfelder* (1976), 96 S. Ct. 1375), it is true that Section 10(b) does not use the words "fair" or "fairness" but literally only mentions deception, manipulation or fraud, a narrower limitation than Rule 10b-5 17 C. F. R. 240.10b-5 could be construed to provide.

Contrariwise, Section 17(a) of the Investment Company Act of 1940 (15 USC §§ 80a-17(a)) prohibits sales or purchases (mergers are included in this category) between investment companies and affiliates, unless exempt under Section 17(b)(1) (15 USC §§ 80a-17(b)(1)) and is not the type of provision sometimes found in acts creating administrative agencies, which gives the agencies the right to establish rules which carry out the general purposes of the Act or carry out the public welfare stated in the preamble, thus enabling the agencies to define the meaning of the legislation in terms of the purposes of the Act as it interprets them. Section 17(b)(1) is carefully hedged about, consistent with the purposes of the Act as set forth in Section 1 (and as relevant to this cause, Section 1(a)(3) (15 U. S. C. § 80a-1(a)(3)) (see Appendix A page A1 *infra*). To grant an exemption under Section 17(b)(1) the Commission has a narrow path to tread. It has to find that

(a) evidence establishes that the terms of the proposed transaction

(b) "including the consideration to be paid and received" are

(c) "reasonable,"

(d) "fair," and

(e) "do not involve overreaching"

(f) "on the part of any person concerned."

The proposed transaction further "has to be consistent with the general purposes of this subchapter" (Section 17(b)(2) (15 USC §§ 80(a)-17(b)(2). One of these general purposes is the expressed concern in the opening Section of the Act about the use of investment companies "to dominate and control other companies." 15 USC §§ 80a-1(a)(3)), referred to in the Opinion below (Pet. App. 54a, p. 15) (see Appendix A, page A1, *infra*). The fairness issue, which is postulated by the 1940 Act (unlike Section 10(b) of the 1934 Act), cannot be avoided by the Commission by considering that a merger of an investment company into an affiliate permits the requirements of the Act, segregated above, to be *ipso facto* complied with, when the investment company is accorded net asset value in the merger. The 1940 Act was an Act drawn with great specificity and represented a compromise of ideas in which exact definitions and scope were spelled out (*Willheim* v. *Murchison*, 2 CCA 1965, 342 F. 2d 33, 42) *cert. den.* 382 U. S. 840. If it were intended to eliminate the historical requirements of an arm's-length bargaining result in a purchase or sale involving an investment company and its affiliate (or a merger included within this terminology), where one corporation controls both sides of a sale or merger, a clearer statement surely would have been included in this specific statute, or the matter left to rule-making.

In *Ernst & Ernst* v. *Hochfelder* (1976), 96 S. Ct. 1375, Justice Powell quoted from his concurring opinion in *Blue Chip Stamps* v. *Manor Drug Stores* (1975), 421 U. S. 730: "The starting point involving the construction of a statute is the language itself." In *Hochfelder*, Justice Powell went on to say at 1383, "The Commission would add a gloss to the operative language of the statute quite different from its commonly accepted meaning." A reference is made to *Addison* v. *Holly Hill Fruit Products* (1944), 322 U. S. 607. In that case the Court said at page 610 "The wider a delegation is made by Congress to an administrative agency the more incomplete is the statute

and ampler the scope for filling in, as it is called, the details." The Court went on to state at page 616:

> In the Fair Labor Standards Act, Congress legislated very differently in relation to the problem before us. To be sure the Fair Labor Standards Act was based on findings and a declaration of broad policy. But Congress did not prescribe or proscribe generally and then give broad discretion for administrative relief as in the Interstate Commerce Act or for remedies as in the National Labor Relations Act. Congress did otherwise. It dealt with exemptions in detail and with particularity . . . . A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. *Exemptions made in such detail preclude their enlargement by implication.* (Emphasis supplied.)

It will be noted that in Section 17(d) (15 USC §§ 80a-17d) of the 1940 Act, which prohibits an affiliated person of an investment company to "effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person . . . *in contravention of such rules and regulations as the Commission shall prescribe* . . . (full quote in Appendix A, page A1 *infra*) *does* leave the Commission the right to prescribe standards in a semi-legislative way. This is in contrast to Section 17(b)(1) in which Congress prescribes the standards. (In this connection it might be parenthetically noted that the registration agreement which was worked out by Christiana and Du Pont would clearly seem to be a transaction such as described in Section 17(d) though never ruled on as such. The emphasis which is made at this point, however, is that the Commission is *not* given the right to set the standards for exemption on sales (which includes mergers). Congress has done that by specifying in detail when exemptions shall be granted in cases of sales (including mergers) under Section 17(b)(1) as contrasted with giving the Commission the right to provide by rule standards for other transactions under Section 17(d).

It is not necessary or appropriate to duplicate the excellent discussion of the Court below in interpreting the Investment Company Act of 1940. The Opinion thoroughly discusses other sections of the Act, relied upon by the Petitioners to buttress the Commission's net asset value interpretation as applied to Section 17(b)(1) (Pet. App. 55a-58a).

Speaking in the same spirit as *Wilheim* v. *Murchison*, 2 CCA 1965, 342 F. 2d 33, 42, against expanding the natural meaning of this very specific statute, this Court in *U. S.* v. *National Association of Securities Dealers (NASD)* (1975), 422 U. S. 694, 711-2, refused to *expand* a reference to "dealers" to include "broker-dealers." It rejected the "decision (below) *reflecting an expansive view* of Section 22(d)," (emphasis supplied) thus echoing the spirit of the *Wilheim* case. The *NASD* case, also, besides requiring a narrow construction of the 1940 Act, highlights, incidentally, the difference between open-end funds whose real net asset value is always available and closed-end funds in which the market find its own level of value, usually a substantial discount from net asset value.

In the *NASD* case, the majority of the Court eventually found that the rule-making power of Section 22(f) of the Act (15 USC §§ 80a-22f) gave to the Commission was exercised by Commission approved NASD rules and this provided an exemption from the antitrust laws. The NASD decision was 5 to 4. The dissent, granting the Commission had the power, queried whether it had ever used it. It is perfectly patent that if brokers banded together to assure that trading in the shares of a closed end investment company was stabilized at net asset value or any other figure, that the antitrust laws would be applicable and, of course, there is no statutory warrant for the Commission to grant protection with respect to the prices of closed-end fund shares after issuance. Curiously this is very similar to what the Commission has done here in attempting to assure that Christiana shareholders get the value of their restricted and illiquid shares in a highly negotiable and liquid stock which can be readily

converted into cash, or into cash less such market damage as may result if more is added to the supply side than the demand can absorb.

Overreaching

Moreover, the word "overreaching" has very similar connotations to the phrase "not bargaining at arm's-length" or not resulting in a transaction which has "the earmarks of an arm's length bargain," or reaching a result reflecting such a bargain or resulting in a "striking disparity" in benefits noted by the Commission's Opinion (Pet. App. 35a). An affirmative resolution of the inherent conflicts can be reached when the bargain which results is one which an independent, willing buyer who does not have to buy and an independent, willing seller who does not have to sell would agree to, bargaining as hard as possible, but consistent with their attitude or willingness to consider bargaining for whatever advantages there are to be gained from the transaction and especially for a share of the increment.

The Petitioner's briefs overlook the fact that there can be no overreaching of Christiana, which involves the assumption that Christiana is being forced into this merger. This is not true. If there is any force, Du Pont is the only one being forced. There might be some unfairness if Du Pont were able to force Christiana to dispose of its shares, or of its assets, by merger or otherwise at the market value of Christiana shares, or even at any discount from net asset value. There simply cannot be any "extracting" as reasonably interpreting what the Act is driving at. Extracting implies an ability to enforce one's will in a transaction which lacks "the earmarks of an arm's-length bargain". Only Christiana can do this.* The Act cannot contemplate that a controlled corporation can overreach its con-

* *See Harvard Law Review, Case Comment,* 90 Harvard Law Review (Dec. 1976) 453-459-60 as to the *dominant* party being the one Section 17(b)(1) was intended to give protection against.

trollers who can both propose and withdraw a proposal and, better still, coerce acceptance* unless the law intervenes so that withdrawal is not needed.

Consideration paid and received

The Commission's Order of Exemption (Pet. App. 36a) omits (fatally, it is submitted) and Petitioners conveniently overlook an important part of Section 17(b), (A. 26) which reads as follows:

> . . . The Commisison shall grant such application for an order exempting a proposed transaction from one or more provisions of said subsection and issue such order of exemption if evidence establishes that—
>
> (1) The terms of the proposed transaction, *including the consideration to be paid or received,* are reasonable and fair and do not involve overreaching on the part of any person concerned; . . . . (Emphasis supplied)

It is not surprising that the emphasized matter is consistently omitted by those seeking to sustain the Opinion, and indeed by the Commission's Opinion itself, because it focuses on what is paid and what is received, and tends to suggest that a consideration of balance *is* required for fairness. As far as Christiana shareholders are conecerned, they are exchanging their shares worth $147 for DuPont shares worth $189. DuPont, in taking over Christiana's assets, is getting something the market valued at $147 and giving something the market valued at $189. The Opinion says that the benefits need not be "nicely balanced" but, as this Respondent's brief in Section VIII shows, the merger terms are patently not balanced at all and are unfair on their

* In *Kern County Land Company* v. *Occidental Petroleum Corp.* (1973), 411 U. S. 457 the court said (at page 594), "In deciding whether borderline transactions are within reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent . . . thereby endeavoring to implement Congressional objectives without extending the reach of the statute beyond its intended limits."

face. Section 17(a) literally prohibits sales and purchases. Can anyone doubt that the "consideration" factor isn't the foremost badge of a fair deal in this type of transaction? Since mergers are sales under Section 17(a), the italicized sentence should be given full value here, and a "striking disparity" (Pet. App. 35a) or "incommensurate" (Pet. App. 18a) share is not consistent with the statutory mandate with respect to consideration. The Commission is entering an Order which failed to include a finding as to "the consideration to be paid and received" was defective and not in compliance with the requirements of Section 17(b)(1) of the 1940 Act.

(b) *Legislative history supports the continued vitality of requiring an arm's-length bargaining result, a vitality in no way impaired by Chenery II.*

The next approach in this matter is to consider whether the legislative history of the statute and its forebears justify an interpretation such as is claimed by the Petitioners and in substance reflected in the Commission's Opinion. It is submitted that there is no justification, not only in the language of Section 17 of the 1940 Act, but also in the legislative history to justify the conclusion that Congress intended first to ban purchases and sales (including mergers) in Section 17a and then to permit them by Section 17(b)(1) on the simple finding that the controlling investment company had a right to impose its will on a controlled affiliate in a non-arm's length bargaining situation regardless of striking disparities in the distribution of the increment from the merger and incommensurate benefits to the affiliate and its shareholders. (See Section VIII of this brief for a thumbnail description of the benefits of the merger and of its detriments.)

The earmarks of an arm's length bargaining transaction are really defined in Section 17(b)(1) of the 1940 Act, but the concept of arms length bargaining is embodied, *in haec verba,* in the 1935 Act, which was a progenitor.

Section 1a of the Public Utility Holding company Act of 1935 (15 U. S. C. § 79a) is captioned "Necessity for Control of Holding Companies". After reciting various administrative and legislative reports indicating the need for legislation, it catalogues the then present situation, which called for legislation. Among the elements detailed is the following (emphasis supplied):

> "(2) when subsidiary public-utility companies are subjected to execessive charges for services, construction work, equipment, and materials, *or enter into transactions in which evils results from an absence of arm's-length bargaining. . . .*"

In the definition Section of the 1935 Act, § 2(a)(11)(D), 15 U. S. C. § 79b(a)(11)(D), the word "affiliate" of a specified company is defined, among other descriptions, as (Emphasis Supplied):

> "(D) any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to such specified company that *there is liable to be such an absence of arm's-length bargaining in transactions between them* as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this chapter upon affiliates of a company."

In Morgan Stanley & Co. v. *The Securities and Exchange Commission* (2 CCA 1942), 126 F. 2d 325, at 332, Judge Learned Hand dealt with the language of the statute last above quoted as applied to a Commission rule which denied compensation to an underwriter which qualified as an affiliate of a utility holding company under the 1935 Act. The court majority upheld the regulation on the ground that the Commission had the right to discourage underwriting transactions with affiliated underwriters on the theory that "the utility company in its bargaining with the banker may be actuated in part by motives *other than driving the hardest bargain it can. . . .* Again I

construe 'arm's-length bargaining' as going *beyond* conventional fiduciary relationships; indeed this seems to me obvious, else the definition would have been redundant. . . . It is notoriously difficult to ascertain just what motives prompt an act—the actor is often the worst witness* and it is legitimate to avoid such a treacherous issue even at the expense of condemning transactions blameless if the whole truth could be known. Indeed the whole law of fiduciaries is built upon just the difficulty of learning the truth with the crude means available." (Emphasis Supplied) Both Mr. Shapiro and Mr. McCoy, the negotiators for Du Pont, considered themselves as representing all of Du Pont's shareholders, including Christiana (A. A475, A605, 6) and both from the start had no intention that Du Pont should share any part of the increment created by the merger and accepted as a principle from the start that the market price of Christiana should be disregarded as a factor (A. A478, A579). Such discount as might be obtained was solely for the purpose of getting proxy statements from people who might visualize (or recognize) the situation as one involving no advantage for Du Pont (A. A476). The Commission's opinion recognizes that there was no arm's-length bargaining (Pet. App. 35a f.62) and, in effect, says that it might well be that a different result would have obtained if there were (Pet. App. 24a). The dissenting opinion of Judge Stephenson (Pet. App. 97a, F.7) agrees with the majority and the Commission that "'substantial weight cannot be given to the bargain reached because of the absence of arm's-length bargaining . . . further that only limited weight can be given the recommendations of the financial advisers . . . I do not disagree neither does the Commission."

* Each of the DuPont's negotiators were "an actor who often is the worst witness" per Judge Learned Hand's statement. In pursuit of their goal to free DuPont's management from control by transferring control to DuPont's management (themselves), (A. A472-5, 6) with half a billion dollar bonus to Christiana shareholders plus an equal additional advantages in marketability and in tax freeness and the detriment of market depression from probable, or only possible, selling of additional shares from the 39% added to the floating supply of Du Pont.

Much reference has been made to decisions under the 1935 Act, especially Chenery II. Essentially this decision was governed by the same principles as *Morgan Stanley & Co.* v. *The Securities and Exchange Commission, supra,* except that the result, eliminating a non-harming fiduciary profiting, is obtained by a Commission decision rather than a Commission rule. The D-C Petition at page 12, distorts the *Chenery II* case (*Securities and Exchange Commission* v. *Chenery Corp.* (1947), 332 U. S. 194 and the *Chenery* case quotation by insertion of bracketed material "the Commission's conclusion here [*as to the fairness of a reorganization under the Public Utility Holding Company Act*] rests squarely in that area . . ." (Emphasis supplied). The Chenery case dealt with the soundness of a determination that a reorganization manager as a fiduciary should not be allowed to keep a profit which he made by purchasing securities in the open market, *at no harm to the company under reorganization,* but at a figure below the value of those securities as determined after the reorganization. The reorganization terms were not in question nor was the fairness of the reorganization in question nor was there any occasion to substitute the Commission's judgment of a transaction which was or was not the product of arm's length bargaining nor to examine the transaction to determine whether there were earmarks of arm's length bargaining.* Furthermore, Chenery II is an example of ***heightened*** fiduciary responsibility, not *lowered* as the Commission's opinion does here, using the 1940 Act to justify engorgement of the fiduciaries in a consensual setting by a half million dollars

* In Justice Jackson's vigorous dissent, Justice Frankfurter joining (two other justices abstained and one concurred in the result 332 U. S. p. 209) the following statement appears (at page 211):

> "It is helpful, before considering whether this order is authorized by law, to reflect on what it is and what it is not. It is not conceivably a discharge of the Commission's duty to determine whether a proposed plan of reorganization woud be "fair and equitable."

Despite Justice Jackson's attempt to be helpful the bracketed material is designed to give Chenery II a misinterpretation.

in the market price of their securities. Chenery II found that these heightened responsibilities resulted from the 1935 Act which lifted the responsibility above the general law of fiduciary responsibility. In Chenery I, *Securities and Exchange Commission* v. *Chenery Corporation* (1943), 317 U. S. 80, Justice Frankfurter said at p. 89 "Congress certainly did not mean to preclude the formalization by the Commission of standards expressing a *more sensitive* regard for what is right and what is wrong than those prevalent at the time the Public Utility Holding Company Act of 1935 became law." Chenery I simply decided the Commission had misapplied prior fiduciary law and refused to support the Commission's Opinion on that basis.

Chenery II drew its strength from the generalized concepts and insights not dealt with specifically in the statute and so decided to be within the scope of Commission determination. Here we have a very specific statute in Section 17(b)(1) (see page 12, *supra*) and there is no occasion to decide it on the basis of selected preamble concepts or other sections of the Act as more fully argued in Point (a), *supra*, of this section of this Brief.

The closing paragraph of the 1935 Act (15 U. S. C. § 79z-4) indicates that Congress had become convinced that all was not well in other fields where companies used other companies to their advantage. The concluding sentence of the paragraph is:

> "The Commission is hereby authorized and directed to make a study of the functions and activities of investment trusts and investment companies, the corporate structures, and investment policies of such trusts and companies, *the influence exerted by such trusts and companies upon companies in which they are interested*, and the influence exerted by interests affiliated with the management of such trusts and companies upon their investment policies, and to report the results of its study and its recommendations to the Congress on or before January 4, 1937." (Emphasis supplied.)

The strongest possible "influence exerted" by an investment company "upon companies in which they are interested" is a mandated sale to, or merger with, a controlled company which does not bear the earmarks of an arm's length bargain.

The Court's Opinion dealing with legislative history of the 1940 Act (Pet. App. 58a) preordained in the 1935 Act, is excellent in its quotation from the *"SEC, Report on the Study of Investment Trusts and Investment Companies; Abuses and Deficiencies in the Organization and Operation of Investment Trusts and Investment Companies, H. R. Doc. 279, 76th Cong., 1st Sess. (1939-1940) at 1411,"* and especially in the italicized portion showing the Act to come was designed to force transactions that were to be exempted into the mold of transactions which "bear the earmarks of an arm's-length bargain" (Pet. App. 59a). The excellent presentation contained in the Opinion, could not be improved upon.

(c) *The Commission precedents do not justify ignoring, as a matter of law, all factors except net asset value.*

No basis in the Commission's precedents nor in the principles stated therein, support the interpretation that, as a matter of law, fairness in merger of an investment company into an affiliate, which the Investment Company controls, must be on the basis of the net asset value of the Investment Company. The Commission's opinion does effectively turn its back on an arm's-length bargaining result (Pet. App. 35a, f.62), and, in effect, concedes that there are no "earmarks" of such in this situation (*e.g.* "striking disparity" Pet. App. 35a). It remains to be developed in this section as to whether there are precedents developed by the Commission which are entitled to be respected as long time interpretations by an agency given an important role in connection with such transactions.

The Court's Opinion specifically points out (Pet. App. 59a) that the absence of arm's-length bargaining for the best possible bargain was the undesirable situation the 1940 Act was designed

to mitigate, and the Court went about it by looking at the results to compare them with arm's-length bargaining results, in other words, to determine "whether or not under all the circumstances the transaction carries the earmarks of an arm's-length bargain" citing (at Pet. App. 61a) *Pepper* v. *Litton* (1939), 308 U. S. 295, 306-7).

The Commission's quotation from *Atlas Corporation*, 1956, 37 S. E. C. 72, 85-86 (Pet. App. 35a, f.62), recognizes that under some circumstances arm's-length bargaining may not be possible in view of the relationship of the parties. Immediately following the quotation in the Commission's footnote, the Opinion in *Atlas* states, "We need not resolve the question of whether or not the Albuquerque exchange ratio was determined at arm's-length *because we must consider independently the fairness of the merger proposal*" (Emphasis supplied). There were comparisons of net asset value, *market value, factoring in of tax factors of various sorts, increased marketability by providing "a much broader and active market"* (Emphasis supplied), and an increased dividend. The Commission, in other words, searched for and found the "earmarks of an arm's-length bargain." It did not turn its back on seeking arm's-length bargaining results as in this merger. *Atlas Corporation* is not cited in either opposing briefs, *and little wonder.* Involved in *Atlas Corporation* was a merger of four operating companies and one investment company, all affiliates, into Atlas, an investment company which had substantial holdings in each of the five companies to be merged. Net asset value was always a factor but never found controlling in the Commission's reasoning, but market value, asset value, increased marketability and numerous other factors were taken into account. The Commission stated, (Emphasis supplied) ". . . *market prices are an important factor to be considered in approving the fairness of transactions under the standards of Section 17 of the Act* . . ." (p. 88). While each ratio had its variables, the Court found that the result would be a net asset value reduction for Atlas of "not more than 4%"

(p. 91). (So much for the D-C petition's claim (p. 7 Footnote 3) that the "discount in favor of Du Pont stockholders was somewhat higher than any discount previously approved by the Commission (1.5%)".*

In *International Mining Corporation* (1956), 37 SEC 209, cited in the Court's Opinion (Pet. App. 62a), to show that many elements were factored into the Commission's Opinions the Commission stated, "If the relative market prices were the sole criterion, it would appear that the merger exchange ratio is disadvantageous to the stockholders of International". The Commission, by this statement merely denied that market price was the *exclusive* determinant (which is the misleading implication at several places in both Petitioners' Briefs as to this Respondent's contentions and the Court below's holding). The Commission, in *International Mining*, went on to say, ". . . while market prices are *an important factor* to be considered in appraising the fairness of a transaction under the standards of Section 17 of the Act, they cannot be regarded as controlling" (Emphasis supplied). Market value of Christiana is given no place, let alone an important place, in the Commission's treatment here, neither are increased marketability, tax considerations, lack of benefit and, in fact, actual detriment from market depression of Du Pont stock, which the Commission considered not "cog-

---

* In *Fair Shares in Corporate Mergers and Takeovers, Brudney and Chirelstein*, of the faculties of Harvard and Yale (1974), *88 Harvard Law Review*, 297, 310, in dealing with the sharing of merger increment in footnote 36, the authors state, presumably not carelessly:

> "The sharing requirement is sometimes found in opinions of the Securities and Exchange Commission dealing with the fairness of mergers under the Investment Company Act, 15 U. S. C. § 80A (1970). LaSalle St. Capital Corp., SEC Investment Company Act Release No. 6693 (Aug. 23, 1971); Talley Indus. Inc., SEC Investment Company Act Release No. 5953 (1969-1970 Transfer Binder), CCH Fed. Sec. L. Rep. § 77,774 (Jan. 9, 1970); Townsend Corp. of America, SEC Investment Company Act Release No. 4045, at 35-39 (Sept. 2, 1964); Atlas Corp., SEC Investment Company Act Release No. 2920 (Oct. 19, 1959). *Compare* Burco Inc., 15 S. E. C. 828, 832-33 (1944), *with* Iowa Interest Corp., 40 S. E. C. 927 (1960)."

nizable" (Pet. App. 22a) as a matter of law (Pet. App. 42a).

Before turning to an examination of the three precedents relied upon by the Commission we refer again to the advice of Du Pont's counsel to the financial advisors at the time of their retention which is set forth in Footnote 12 of the opinion (Pet. App. 53a). Surely this outstanding firm knew whereof it spoke when it gave the advice as to what the Commission examines in Section 17(b)(1) cases which is exactly contradicted by the Commission's opinion.

The Commission cited three decisions to support its statement (Pet. App. 32a, footnote 57); ". . . we have viewed net asset value as the controlling factor in Section 17 proceedings". The first of these citations is *Harbor Plywood Corp.* (1962), 40 SEC 1002, 1010. This case came to the Commission at the end of a substantial derivative suit controversy in which it was charged that the operating company, which held over 70% of the shares of the investment company, had manipulated affairs and abused its fiduciary position. However, by the time it went to the Commission for exemption, there had been *an arm's length agreement* of settlement by the contestants, and the Opinion mentions the agreement of the parties on net asset value, plus added benefits, hardly a controverted decision by the Commission. A notice of the hearing was circulated to Harbor Plywood shareholders and some appeared and participated in the hearing. While the earlier litigation might be considered to be rather hard-fought, the opposition at the hearing was not very impressive. In a case where it is charged that a majority holder had done things to hurt the price of the investment company shares, it is not surprising that part of the settlement would be at least conceding net asset value as a basis for a settling merger and, in fact, the Investment Company shareholders received more than their net asset value in settlement of their claims for damage. There is just no gainsaying that there was no principle involved that in mergers there must be an exchange ratio based on the investment company's net asset value; that is, until this matter under review.

The second citation is *Delaware Realty and Investment Company* (1961), 40 SEC 469, 473. This case is discussed in the Court below's Opinion (Pet. App. 63a) as based on available alternatives. DuPont's counsel in its memorandum "Factors to be Considered in Report of Investment Bankers" (A. A848) dated June 6, 1972 the same date as the formal retention of the investment advisers (A. A846) stated as follows (A. A849-50):

> "From du Pont's point of view, the most favorable terms of a merger would be those that approach the full amount of the discount. However, in the Delaware Realty case, the SEC accepted, as a basis for merger terms, values based on underlying net asset values. *The rationale for this was that the parties to the merger had alternative means of recognizing net asset value without significant tax effect.*[1] [1. Other similar cases considered by the SEC have involved little or no discount, *but have not expressed a specific rationale* for this approach.] We understand that Christiana would be prepared to take the same position here: Under the 30-day liquidation provisions of Section 333 of the Internal Revenue Code, Christiana presumably could achieve with relatively limited taxation a liquidation in which its du Pont securities would be distributed directly to its shareholders. Counsel to Christiana is preparing a memorandum describing the application of Section 333 to a dissolution of Christiana.
>
> The report *should* indicate whether, *on the assumption that the 30-day liquidation provisions would operate to Christiana's benefit here, du Pont would be justified in giving little weight to the market value of Christiana in the merger negotiations.*" (Emphasis supplied.)*

The engrossing case of *Central States Electric Corporation* (1949), 30 SEC 680 was a bankruptcy reorganization in which the plan approved, among competing plans, for the elimination

* This is an egregious example of what in the Court's Opinion and in the opinion of the SEC staff substantially undermined the asserted independence of the financial advisers (Pet. App. 76a and Footnote 28 thereto). The text at this point concentrates however on the solidity of the Commission's statement that net asset value was controlling in view of its cited precedents.

of two investment company subsidiary affiliates of the debtor, itself an investment company, with their portfolio assets becoming assets of the debtor, and the debtor becoming an open end investment company, which makes net asset value the sole valuation factor under Section 22 of the 1940 Act. The opinion has some language, general in nature, but dicta in the context of this case, which is verbally close to the language used by the Commission in this case. The extraordinary leverage in the debtor made it essential for the Commission, in line with its allegiance to priorities in debtor re-organizations (as well, of course, as considering priorities as its principal concern in public utility company reorganizations) to deny to lower classifications of debt and equities the advantages which they would obtain, if they could limit the higher classifications to the market price of the disappearing investment companies, and not to the portfolio prices of the disparate marketable securities which the debtor would receive. Since the goal of the reorganization plan was to reconstitute the debtor as an open end investment company, the value of its assets resulting from its subsidiary investment companies disappearance would have to be at their market prices (there is nothing consensual about the situation). The Commission's general language is hedged; viz: "under the circumstances of this case" (page 700) "by and large" (page 700). The fact that a key factor of the plan to exchange one of the subsidiary's portfolio stocks for its own stock outstanding could be accomplished without tax consequence was also crucial (page 691-2). This situation was no longer available under later tax reform amendments (A. A295).

As far as uncontested ruling go, in *Securities and Exchange Commission* v. *Sterling Precision Corp.*, 2 CCA (1968) 393 F. 2d 214 cited by the Court (Pet. App. 63a), the opinion states:

> "The SEC is right in saying we should decide the issue as one of federal law, even though a Delaware court construing its corporation laws might come to a different conclusion. *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65; *Tcherepnin* v. *Knight*, 389 U. S. 332. . . .
>
> There remains only the contention that for over twenty years the Commission has considered § 17(a)(2) to cover redemptions, even when these were total, see In the Matter of Atlas Corporation, 23 S. E. C. 43 (1946), or pursuant to a sinking fund requirement, see In the Matter of Bankers Securities Corporation, 25 S. E. C. 325 (1947), unless the redemptions were within the exemption established by Rule 17a-4 in 1947. In both these cases the applicants voluntarily sought exemption under § 17(b), the applicability of § 17(a) being simply assumed, and the exemption issued. *Uncontested administrative construction of this nature carries relatively little weight. Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 290; *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140; Cf. *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U. S. 261." (Emphasis supplied.)

(d) *The Commission's opinion disregards DuPont's and DuPont's shareholders' legitimate interests in an arm's length bargaining result, including sharing in the incremental values of the merger, in this fiduciary context.*

The Opinion of the Commission breaks new ground in eliminating the consideration of arm's length bargaining, or an arm's length bargaining result, where there is common control of two corporations. It, in effect holds that it is not necessary that resultant merger terms be that which would, or even might, be arrived at by independent corporations free to merge or not to merge. No amount of scrutiny, let alone "rigorous scrutiny" (*Pepper* v. *Litton*, 308 U. S. 295, 307), is called for or recognition that both sides to a transaction are free to walk away in an arm's length transaction is in order. Even a demonstration that DuPont's shareholders would definitely suffer a loss in the market value of their shares, and that DuPont itself would suffer because of the depreciation of the value of its shares, if it uses them, as it has frequently done, to make acquisitions, and further

in the event it would find it helpful to go into the capital market to issue new shares.

The Opinion gives a good deal of attention to the market impact argument.* Essentially, however, it considers that market impact is immaterial even if demonstrable. This is the only inference that can be drawn from the Opinion and especially from the denial of Petitioner's Motion for Rehearing and for Leave to Adduce Additional Evidence. (See page 3 of Release No. 8692, and footnote 6 thereto) (A. A80). Thus even if it was demonstrated that there could be market effect, great or small, short or enduring, that Wilmington Trust Company would choose for a variety of reasons, including diversification, but not exclusively for that reason, to reduce its gargantuan billion dollar holdings of marketable DuPont by two-thirds, and if many of the affiliated and unaffiliated holders should choose to sell to take advantage of the $42.00 rise in price, a result called for by the laws of supply and demand, and if even the Directors of Christiana should feel the same urge, presumably changing their stance, so that there would be concededly market damage, nevertheless Christiana would not be *permitted* to merge at much greater discount than the 2½% or to put it another way, at a lesser premium than 28.5% over the previous market value of Christiana shares. Thus it would seem that the Commission as a matter of law interprets the Investment Company Act of 1940 as making immaterial independent negotiations, or a result which would be consistent with arms-length.

Logically, if the 1940 Act is so pervasive, and the net asset value of Investment Companies so sacrosanct, the Commission should not permit any discount and the record is clear that the concept that DuPont should be allowed to share in the benefits was in fact rejected and the discount *was* a mere pacifier

* See DuPont and Christiana's presentation on market impact in *United States* v. *DuPont* (1959 N. D. Ill.), 177 F. Supp. 1 rather fully treated in the next section of this brief.

(Opinion, page 11) (Pet. App. 13a). No one viewed the discount as a sharing (A476, 581).

It is hard to see what Christiana has to offer here that would justify its claiming all of the merger benefits. The Commission's Opinion concedes this and makes its decision on the supposition that there is truly no other benefit to DuPont than the 1.8% discount from Christiana's net asset value which will result, based on the figures prior to the merger talk, in DuPont's earnings being increased three cents a share out of around $7.33 in 1971. It is conceded on all sides that this would not result in any market improvement or change the opinion of an analyst, speculator or long or near term investor. In a sense, giving the concession as a benefit really amounts to a deceptive device. If the DuPont shareholders were represented by independent negotiators, it is perfectly obvious that they would have sought at least some of the benefit, perhaps ½ (equality is equity) that their cooperation made possible. In any event, they should have some proportion.* A company income increase of three cents a share out of $7.33 is an insult, not a benefit.

In an independent association, there is no need for either party to merge unless it chooses to do so. Probably the best things for DuPont and its shareholders is not to merge, but DuPont under common control did not have this choice. Furthermore the active management of DuPont would not have obtained control from the vendors of it here if they did not go along and quite reasonably might fear they would fall vulnerably out of favor. This transaction, as the Opinion notes, is a zero for DuPont and its shareholders. When Christiana had the votes to force a merger, the negotiators had only the question of the terms before them. It turns out now by virtue of the law made by the Commission's decision there was a very narrow range of bargaining

* This sentence, copied from this Respondent's Eighth Circuit Court Petition for Review was printed long before the *Harvard Law Review Case Comment* (page 54, *infra*) suggested an even split of the benefits (*90 Harvard Law Review 453 at 460*).

room available, and that DuPont's cooperation deserves no financial recognition in the wealth it generates. It does, after all, contribute its price to generate the wealth and this should be taken into account, as well as the fact that, theoretically it loses nothing in the view of the Applicants and the Commission, a view not shared by your Petitioner.

Per contra, the fairness of DuPont's sharing in the incremental values from a merger with a controlling fiduciary, in which it and its shareholders' participation is an essential element, has recently been strongly supported in principle. See the lead article in the December, 1974 issue of the Harvard Law Review by Professors Victor Brudney of Harvard and Marvin A. Chirelstein of Yale. *"Fair Shares in Corporate Mergers and Takeovers,"* 88 Harvard Law Review 297. Though the authors illustrate their point with an example of a fiduciary controller absorbing an affiliate and producing incremental benefits, their thesis is that on fiduciary principles the increment should not be absorbed by the power center.

III.

MARKET IMPACT IS OF GREAT RELEVANCE AND IMPORTANCE IN THIS MATTER, ALTHOUGH PROBABLY A SUPERFLUITY.*

(a) *Commission studies.*

We refer the court to a *Study of Mutual Funds, Wharton School of Finance and Commerce,* contained in the *Report of the Committee on Interstate and Foreign Commerce, H. R. Report No. 2274, 87th Cong., 2nd Sess., 1962.*

The above is a Report to the Securities & Exchange Commission which, in turn, forwarded it to Congress. Thereafter it was printed as a House Report. There are two sections of the Study which have a special significance to the DuPont-Christiana merger and the market impact which may be expected when Christiana Securities Company, a closed-end investment company, is merged and its shareholders become DuPont shareholders. The 132 shareholders hold over 90% of the new DuPont shares in average blocks in excess of 75,000 shares (A. A512 and see page 7 *supra*), and if they move out of their DuPont shares in any quantity, will each cause market impact similar to the market impact that might be expected, and which is studied, in connection with portfolio liquidations of investment companies. It certainly is much more relevant to

* The "superfluity" assumes that the arguments of the preceding sections of this Brief (and any points made hereafter other than related to market impact) are not sufficient to dispose of this matter. The Commission's Opinion designated market detriment as "the crux of the case." Obviously there was a great deal of cutting and fitting in the preparation of the long-delayed Opinion, 21 months after hearing and 17 months after oral argument. This resulted apparently in transferring the "crux" to the "striking disparity" of benefits. This Respondent primarily relies on this striking disparity, but subsidiarily urges that if this is not controlling, then market impact is a supervening circumstance that is relevant and pertinent, and that evidence with respect to it is not pointlessly swelling the record, as the Opinion states (Pet. App. 36a, footnote 63), nor is it irrelevant (Pet. App. 42a).

relate to market impact studies in this connection than in relation to ordinary stock transfers in small round lots (see footnote page 56 *infra*).

Chapter VI, at p. 359 *et seq.*, deals with *"Impact of Investment Funds on the Stock Market."* At p. 363 the Report points out, *"a continuous succession of short run stimuli could affect the level of stock prices for a long period of time or at least until the stimuli was withdrawn."* (Emphasis supplied.) The discussion, of course, refers to the stimulation, upward or downward, from substantial institutional type purchases or sales. This is strikingly similar to the testimony in the General Motors divestiture case to be discussed later in this section.

The Commission's opinion seems at a loss in simply confronting an extremely simple problem whether some factor should be allowed for market impact from the vast increase in the floating supply, and the probable increase on the supply side of the supply-demand equation in the market which will inevitably (probably? possibly?) depress prices over a period of time. Its treatment (Pet. App. 26a-31a) is rather wide-eyed as if it had expertise enough to see the extent of the problem but absolutely no ability to judge whether experience or analysis might lead to a reasonable conclusion that it would be fair to make some allowance in the ratio for market impact.

The term "market impact" is featured in the wide variety of Commission documents incorporated in House Reports. In the Report, *"Public Policy Implications of Investment Company Growth,"* prepared by the Securities & Exchange Commission and forwarded to Congress, *H. R. Report No. 2337, 89th Cong., 2nd Sess., 1966,* Chapter VII (pp. 275-306), deals with the subject of investment company growth *and market impact*. Secondary distributions are described at p. 282. In a subdivision entitled "Mutual fund impact on stock market prices," there is a statement that the assessment is complicated by the numerous factors affecting the market at any time, p. 286.

This last circumstance did not prevent the Commission from plunging ahead to some generalizations or conclusions. Contrastingly, in the Commission's opinion here (Pet. App. 31a and footnote 55 thereon) agnostically protests that stock prices are volatile and the factors that influence them multifarious as if this is an excuse to ignore market impact, not as controlling but simply as a factor.

(b) *The General Motors Divestiture litigation evidence.*

The Commission has had market impact under its microscope so many times that it must know its importance in dealings in large blocks. This Respondent however presented the evidence in the General Motors divestiture case *United States* v. *DuPont* (N. D. Ill. 1959), 177 F. Supp. 1), the only comparable case in the law books.

Dr. Irwin Friend of the "Securities Research Unit" of the Wharton School of Finance and Industry was one of the authors of the *Study of Mutual Funds* (*supra*, p. 33) and signed the transmittal letter on behalf of the Unit. Obviously, Dr. Friend is a man of some prestige and information. Part of his testimony in the General Motors divestiture case is found in the Appendix of this case (A. A895). His testimony was that *the effect of a large secondary might last as long as fifteen months* (A. A891, 2). In view of the provision for an annual registration rights for secondary offerings at the request of Christiana holders and without reference to DuPont's control, plus the twice-a-year registrations in April and October for sales in the auction market or by block selling or any other method of distribution other than an underwritten secondary (A. A961-5), it was, to say the least, callous indifference on the part of persons having charge of the welfare of DuPont shareholders to disregard this factor.

There is also testimony of DuPont witnesses in the divestiture suit, part of Murtaugh's Exhibit 2 in this case. A partner in Morgan Stanley and Company (A. A903-7) and an officer of

Merrill Lynch, Pierce, Fenner & Smith (A. A911-2) both testified to a ten- to fifteen percent effect of repetitive sales *even if pending tax revisions, designed to make the General Motors divestiture tax-free, were adopted.*

In the lower court hearing in the General Motors divestiture case, *U. S.* v. *DuPont*, 177 F. Supp. 1, 31, the opinion of Judge LaBuy expressly recognized the testimony of Witness Lenz of Merrill Lynch, Pierce, Fenner & Smith in connection with the elimination of any tax element from the merger:

> "Lenz also gave his opinion as to the effect of the Government plan in case a bill such as S. 200 passed and the du Pont Company made one distribution of the 63,000,000 shares of General Motors, but where the trustee still sold shares going to Christiana and Delaware in ten equal annual installments. He estimated a 10% to 15% decrease in market price."

See also the excerpt from DuPont's Supreme Court Brief (Appendix B, pages A2-3, *infra*), reviewing the evidence on market impact with the heaviest emphasis on the effect of repeated sales. *United States* v. *DuPont et al.* (1961), 366 U. S. 316.*

---

* Despite the Supreme Court's refusal to support any solution to the Clayton Act violation other than divestiture, Congress was so impressed with the DuPont and Christiana contentions as to market-depressing tax selling if the General Motors share were treated as a taxable dividend which were strongly pushed before its committee (Murtaugh Exhibit 1 not printed) that it passed special tax relief legislation. The legislation is found in 26 U. S. C. 1111 and 301(f). Even after the tax relief bill, however, the District Court Judge on the final remand to implement the divestiture directive of the Supreme Court found that periods of *34 months* for DuPont shareholders and *36 months* for Christiana shareholders were each "the shortest period within which such divestiture can be executed with due regard to the circumstances of this particular case" (Murtaugh Exhibit 9, A. A951, 2, 6). The circumstances, of course, were that 22% of the General Motors stock previously held by DuPont were to be added to the floating supply. Here 28% of DuPont is proposed to be added to the floating supply and in *one* distribution.

(c) *Consequences of impact.*

Let us consider the situation if, for a period of years until the market can absorb the price depression resulting from the three-pronged entry into the market of new DuPont shares,* there would be an average depression of 10%, which would not have occurred if the 34 million of DuPont in the floating supply had not been increased by the thirteen and a half million shares held by Christiana. This price depression, of course, would affect the new DuPont shareholders if they sold, by reducing their $42.00 per share theoretical increment which is based on the $189.00 market price of 1.23 shares of DuPont. Approximately $19.00 would be eliminated from the increment, leaving a net available increase of $23.00 instead of $42.00, or approximately 15% as opposed to the 29% that they would gain were there no market impact. The corollary, however, is that all other DuPont shareholders would be affected by the 10% price decrease. Excluding the new DuPont shares, the 10% decrease from a price of $168.00 per share would be $16.80 per share, or a total of around 571 million dollars in price depression (34 million multiplied by $16.80). On this basis it would appear that the market price of Christiana shares, already 25% below its net asset value per share, would just about equal the market impact. This suggests that the merger ratio should be based on Christiana's market price rather than its net asset value, since the entire difference is absorbed by the market depression factor, assuming a 10% market depression over a period of time.* In the Table (Pet. App. 104a-108a) attached to the Court's

---

* (1) Sales of unregistered shares in the auction market not limited as to 25% of the new DuPont shares and permissible up to 50,000 to 60,000 shares apiece in six months as to restricted shares (A. A429), (2) sales of registered shares in the auction market or in block selling (A. A439), (3) sales by registered secondaries once a year if over 25 million dollars is involved (A. A430-31). The Registration Agreement itself is found at (A. A961-5. Murtaugh Exhibit 15.)

* Neither Respondent suggests more than half.

Opinion there are valuable comparisons based on different ratios. The columns (h) and (i) are especially instructive. Column (h) gives approximately half the increment of each of the merging parties but keeps Christiana's distributable dividend income intact, being enabled to do this because of the elimination of the inter-corporate income tax, but still affording Christiana shareholders a 272 million dollar increase in market price with the benefit of feasible marketability and tax freeness in addition. Column (i) assumes that the entire increment is eliminated; that is, that the exchange is at Christiana's market price.

(d) *Detriment to DuPont as a company.*

It is not correct to say that DuPont itself would suffer no detriment from a depression in the market price of its shares. Two detriments are apparent.

At the DuPont divestiture hearing DuPont introduced evidence by Dean Neil Jacoby of the U. C. L. A. Graduate School of Business (A. A909-910) as to the harmful effect on General Motors if the price of the General Motors stock would be depressed by a factor of 20% and if General Motors should attempt to raise capital by a new stock issue, which, of course, would produce less cash and thus raise its cost of capital.*

The second detriment is that DuPont would suffer from a depression in the price of DuPont stock in that it might interfere with the use of its stock in acquisitions, or might require it to issue more shares than it otherwise would. See the article "Shenandoah Oil Ends Merger Talks with DuPont," *Wall Street Journal*, July 12, 1976, p. 6. See also *Business Week* item in July 29, 1976 issue, p. 54. The lowered price of DuPont apparently aborted this acquisition by stock when Shenandoah sought a larger number of shares than previously agreed to; this is a lost

* Murtaugh Exhibit 2 is much longer than the material shown in the Appendix (A. A891-912) and can be quickly read, but the entire exhibit is, of course, only a fraction of the several thousand pages in the transcript of the divestiture hearing.

opportunity affecting DuPont, and derivatively all DuPont shareholders, including long-term investors. Companies with adequate information and good judgment are liable to be wary of a stock being acquired which has a large block selling or secondary overhang situation and certainly will want to renegotiate if the shares they expect to get drop in price.

It is not correct, therefore, to say DuPont itself would not be hurt by market depression of its shares.

(e) *"Long-term investors" concepts or verbiage add nothing here.*

The Opinion of the Commission seems to ultimately rest on these sentences: "The record indicates that most of Christiana's stock is held by long-term investors. Hence there is no pressing need to depart from the net asset value test (Pet. App. 32a). In the accompanying footnote 37 the Opinion states "Investment companies are as a general rule media for long-term investment. This makes net asset value the touchstone."

At the SEC hearing, Charles Townsend of Morgan Stanley & Company stated that large stockholders of Christiana might not have been able to sell their Christiana shares if they wanted to, even though the share price, due to the announced merger terms, had gone up to within 4% of the 1.123% discount from the net asset value agreed upon by the Boards, because large stockholders (insiders) would not have been able to sell in the auction market, since such sales would have been subject to registration under the Securities Act of 1933 (15 USC Sec. 77a) (A. A280). This point was missed in the expertise analysis of the writer of the Commission Opinion, who drew an inference that long-term holders of Christiana had, by reason of their long-termness, justified the conclusion that they would hold on to their new DuPont shares (Pet. App. 32a). The marketability of the new DuPont shares is enlarged upon elsewhere in this Brief. The effect is to substantially eliminate the reason why Christiana shareholders had held on to their shares. Greater marketability

(the chains of Rule 144, 17, CFR § 230.144 loosened 30 to 1 over its Christiana restriction) was one of the factors the president of Christiana indicated as a reason for the merger (Pet. App. 48a, fn. 5).

Moreover, by definition their long-term holding would be ended by the merger and new conditions will apply of higher prices, greater marketability, less yield per dollar invested than presently, and, best of all, registration rights on call at their own direction and discretion.

Wilmington Trust Company, with its 56% of new DuPont shares in a liquid market would be no longer able to defend itself on the grounds that its holdings were so huge and restrictions so confining, that it was useless to attempt to sell, as it was in the Christiana market.*

The golden chains that held large Christiana shareholders in their shares will have been cut, with gold added in the process, and it is idle to think under these conditions that there will not be substantial liquidation and consequent market impact. The Commission wisely made no finding as to how the stock would fare under these conditions, and it refused to receive evidence on the subject (Pet. App. 40-43a) reasonably requested by your Respondent in his Supplemental Petition as irrelevant (A. A204).

---

* On trust diversification imperatives, see "Market Funds and Trust Investment Law," Langbein and Posner, Volume 1976, No. 1, American Bar Foundation Research Journal, page 1, at pages 3-21. See also Kripke, *A Search for a Meaningful Disclosure Policy, 31 The Business Lawyer* (A. B. A. 1976) 293 at 305-6. Section III of Professor Kripke's study entitled "Some Aspects of the Economics of the Securities Market" (at pages 305-12) may be especially helpful to the Court. On the opening page of the article itself (page 293), the author states:

> "When one reads the economic literature, one realizes almost at once that there is a hiatus between the SEC's pretensions as to what it is accomplishing and the economists' appraisal of what the SEC is accomplishing. The economists almost totally ignore the SEC, treating it like some imperfection in a communication system, like some static. Its role is obviously not of fundamental importance to their thinking."

(f) *Misapprehension of the Court below.*

The D-C Petition objects to the Court's finding (Pet. App. 92a) that market impact was a factor that should have been taken into account. However, it is obviously gratified that in summing up, the Court below referred to this detriment it had found as minimal (Pet. App. 91a). The Court's assessment of minimal detriment is based on a substantial misapprehension as to how great and continuous underwritten offerings could be.

Bolstering the foundation of the Court's Opinion finding of error in the Commission's failing to give any weight to the factor of detriment to DuPont shareholders (Pet. App. 90a) is the fact that Court Opinion erroneously assumes that "the merger agreement, however, provides that once a year an underwitten offering of $25,000,000 in the then current market value of such shares can be made. At the average price of $165.00 in the first 6 months of 1972 this would approximate 153,000 shares" (Pet. App. 90a, f. 38). The Court Opinion's error in regard to secondaries is twofold; the first, and least important, is that the merger agreement is not the instrument which refers to underwritten offerings that reference is found in the agreement regarding registration (A. A962-964) which was considered after the agreement to merge in principle had been made in July of 1972. Disclosure of its terms in general was made by the introduction into evidence of the then current draft of the registration agreement by this Respondent as Murtaugh Exhibit 15 (A598). The second, and more significant, error in the Court's Opinion (Pet. App. 90a, f. 38), but one which only fortifies its conclusion of materiality is that the reference to the underwritten offerings of $25,000,000 once a year is not correctly stated be the floor but incorrectly stated to be the ceiling for such underwritten offerings. In other words, the registration agreement provision is that the underwritten offering shall not be less than $25,000,000 (A. A963), but it can be as much more as the former Christiana shareholders

choose to demand. In fact, DuPont is required to notify other shareholders having registration rights so they may add on (A. A963-4). Were it not for the error the court might well have refrained from classifying the potential detriment as minimal. The Court failed to study Dean Upson's Report which referred (A. A1001) to much larger secondaries which had been referred to in the record of this case (DuPont Exhibit 2 not printed). Referring to secondaries of 90.5 million dollars and 239.8 million dollars which would equal 1.16 and 3.06 of DuPont's outstanding shares (A. A1002) the Upson Report pointed out that

> "Of the above-listed numbers of shares, those arising out of the secondary offering are larger, as a percentage of outstanding shares, than those referred to in the testimony from the *General Motors* relief proceedings included in the Joint Appendix. That testimony is summarized in Mr. Murtaugh's Brief, p. 63, '. . . the market impact on General Motors would be 15% from a program of selling 0.7% of General Motors for ten years (postponable in bad years).'"

A further point supportive of the Court Opinion is the fact that DuPont has no power to refuse to register its shares for underwritten secondary offerings annually (A. A963-4) unless it would interfere with its current financing (A. A964-5). The reason secondary offerings can sometimes be effected with surprisingly short term adverse market effects is that the company can exercise its best judgment as to when, in its interest and the interest of its shareholders, the adverse effects will be offset by other factors (A. A269-70). With the discretion solely in the hands of individual Christiana shareholders as to where their bests interests lie, the potential for damage is greatly increased and the remaining shareholders of DuPont are hostages to fortune.*

* On direct examination Charles Townsend of Morgan Stanley testified on the basis of an assumption of 10% of DuPont Company stock, 4.7 million shares, being marketed over a period of five years. As to the time span of periodic market effects following

(Continued on next page)

Of course, the size of the issue and its market impact, which might be well called minimal if limited to 153,000 shares, as the Court assumed, cannot be so judged when it may be limitless, beyond DuPont's control, and must be above 153,000 shares. There is no limit, except in the disparate selling shareholders discretion to prevent overtaxing the market, which Du Pont's Morgan Stanley witness warned against (A. A270-1).

IV.

THE COMMISSION'S OPINION ASSERTS ECONOMIC REALITIES AND EQUIVALENCES WHICH ARE NOT REAL, IGNORES OTHER REALITIES, AND ERRONEOUSLY ARRIVES AT AND SANCTIONS A DIVISION OF INCREASED VALUES WHICH IS NOT FAIR.

Things equal to the same thing are equal to each other. Yet no one would claim that ownership of a share of DuPont was essentially equal to the ownership of .87 share of Christiana. To state the reverse, a share of Christiana is essentially 1.15 shares of DuPont, is simply to use loose language suitable perhaps for limited purposes. When a loose generalization with some utility and limited truth is frozen into a universal affirmative proposition, it is not surprising that an unreal conclusion is reached logically from the swollen major premise. This sophistical reasoning deserves study.

(Continued from preceding page)

successive issues, he testified (A. A270-71) "It would be difficult to tell. Maybe a month, maybe two months, maybe even three months, *depending on the market conditions at the time,* the way in which the underwriting has been done. We would not want to recommend that sellers of duPont stock *overtax the market at any particular time,* and *the size of the issue would have to be gauged accordingly*" (Emphasis supplied). Neither Morgan Stanley nor DuPont have any controlling thing to say about the *size* of an issue, or whether it would overtax the market at any particular time under the Registration Agreement (A. A962-5). Therefore, the assumptions in the witness' testimony as to detrimental market effects based on postulated good market conditions or a limited size of the issue and a gauging based on any DuPont Company interest as against the seller's view of their own best interest is fanciful.

There are, of course, obvious differences between ownership of a share of DuPont and the ownership of a share of Christiana. A Christiana shareholder does not own DuPont, it is owned by Christiana. If he converted his Christiana shares to cash, before the merger talk he would get only ⅞ of the price of a share of DuPont stock. It would take 8 shares of Christiana, in even barter at market prices, to acquire 7 shares of DuPont. (The merger gives him 9 shares of DuPont for 8 shares of Christiana.) In a liquidation he would, of course, get his 9 shares of DuPont but at a tax cost totaling possibly a billion dollars to individual shareholders. The three million shares of new DuPont which would have a zero basis would involve a taxable gain of well over a half billion dollars figured at the time the ratio was struck in July, 1972. It is only by the cooperation of DuPont that the Christiana shareholder is put into a position to avoid the immediate tax burden.

As a holder of Christiana, shares he cannot vote in DuPont elections, except derivatively as part of a block. He cannot sell an aliquot part of Christiana's DuPont shares as he, post merger, could sell DuPont shares. He does not share in the undistributed earnings and profits of DuPont. The 2.2 billion dollar figure he sees in the footnote to Christiana's financial statements as net asset value he knows means little, partly because Christiana's large taxes if it sold DuPont would wipe out at least ¼ and partly because the sum is simply not realizable for blocks of that magnitude as Christiana's reports and filings constantly warn. In fact instead of using the word value or market value Christiana's tables constantly say, "Shares owned times price per share" except in the merger documents where it is so documented only in the accountant's footnotes (A. A494-5). *In fact, the 2.2 billion dollar figure is a figure based on a floating supply which excludes Christiana's DuPont shares.* Lastly, he knows if Christiana liquidates he would have to sell 25% or more of the shares he gets to pay for capital gain taxes if he has a zero basis and, of course, somewhat less if his basis is above zero. Still, speaking

loosely, but closer to the point, what a Christiana shareholder has is not DuPont stock but an aliquot share in a huge block of DuPont stock with many impediments and barnacles on it to distinguish it from other DuPont shares.

Nevertheless, there is a seeming but deceptive fairness in a merger in which existing DuPont shareholders simply retain their present shares. The argument is that they suffer no change and, therefore, should neither complain about the merger nor seek an exchange ratio for Christiana shares, or Christiana's DuPont shares, which will, in effect, divide among all DuPont shareholders at least part of the vast increase in values of the investors in Christiana which its cooperation makes possible. The reason appearances are deceiving so far as existing shareholders are concerned is that the existing DuPont shareholders hold their shares in a context where there are only 34 million DuPont shares in the floating supply. When as a result of the merger 13½ million shares of DuPont owned by Christiana are added to the floating supply, the existing DuPont shareholder while firmly clutching the same certificate has been forced to consent to a radical change in the floating supply situation and in the relation of his shares to the total floating supply. The financial advisors all recognized this. Edward Townsend said that the ratio should be adjusted in favor of existing DuPont shareholders, if there were going to be substantial sales (A. A367-8) and that he had extensively discussed this possibility (A. A345-6) and had been reassured that there would be no such sales. Amusingly, Chairman McCoy described the extensive discussion as being one in which Mr. Townsend reassured him there would be no impact (A. A585). The report of Kidder, Peabody Co. was specifically based on the assumption that there would not be substantial sales (A. A839). Morgan Stanley's report relied exclusively on the tax basis deterrent so far as its written report was concerned (A. A625). On cross-examination Charles Townsend of Morgan Stanley agreed that if there were to be substantial sales that should have been taken into account (A. A292).

The plain evidence of the lack of arm's-length negotiation is the simple faith (?) with which the DuPont side accepted verbalization gleaned from assurance by the attorneys representing Christiana that there were no present intentions to sell (A. A584-5). It might be conceded, for the purpose of argument, that if Christiana shareholders agreed not to market their shares, except for special needs such as to pay death taxes or changes of conditions not presently foreseeable, and, if such an agreement was implemented in some reasonable way so as to secure its performance, that DuPont shareholders might have, at least, some basis for confidence that there had not been too great an alteration in their previous status as the holders of shares which had only 34 million shares in the floating supply. It is not fair and reasonable, however, to expect DuPont shareholders not to suffer some adverse consequences from the increase of nearly 40% in the floating supply simply on the verbalization floating around when the ratio was struck on July 6, 1972. DuPont shareholders will *not* have the same shares post-merger as they had before and there is every reason, in view of this, in equity and fairness that the tremendous advantages which come to Christiana shareholders should be more fairly distributed among all DuPont shareholders. There surely would be no extortion or exaction in this situation, only some type of sharing. After all, to extort or exact from Christiana would require it or its shareholders to be held in place, while they are free to refuse to merge.

The DuPont negotiators from the very start had no intention of claiming a share of the benefits (A. A579-580) being content to get control, a matter of, at best, indifference, and not at best, of possible damage to DuPont shareholders as the Commission Opinion recognizes (Pet. App. 19a-20a), but were interested in getting independent financial advisory support for this non-sharing in benefits and stooped to conquer by stressing the alleged Section 333 alternative which justified both ignoring the market value of Christiana, and the impact on DuPont shares of the

increase in the floating supply, and the sales from the newly acquired DuPont at a mark up of over 28% of the market price Christiana investors had prior to the merger. It should be stressed that the alleged liquidation alternative further included not only ignoring Christiana's market price but also argued that market impact would be immaterial because the increase in the floating supply of DuPont would be the same if there was a liquidation as it would as if there was a merger. The implications of removing the alternative never had a chance to be considered because the negotiation was over before the advisors were told that the liquidation alternative was not feasible. There never was an interval, therefore, in which market impact could have been given the serious studied decision both as to whether there should be a merger, or what the terms should be, reflecting the fact that the merger itself was the only way Christiana could get the vast benefits.

Reasonably independent negotiators guided by an interest in the DuPont shareholders other than Christiana could certainly say, "Those we represent should be entitled to share in the greater "benefits" which are being created. Whatever post-merger impacts occur are solely within former Christiana holders control, be they short or long term impacts. It is realized that you will share them from a platform which a merger creates which raised the value of your investment at least 30% by simple arithmetic and so you have a cushion other DuPont shareholders do not. The marketability you obtain will be in the form of added supply. It is fair that we ask a share of the benefits (which, of course, you will recapture to the extent of 28%)." Here is a point at which true negotiations at arm's-length would reasonably, rationally, morally and ethically factor in the market value of Christiana shares and the increase in the floating supply as an element to be considered not ignored.

Looked at in another way, The Commission in its wisdom and sophistication indicates that the situation as between DuPont and Christiana was such that there may not have been

the possibility of arms-length bargaining (Pet. App. 35a f. 62). The Commission had great difficulty with this case because of the great disparity of the benefits but pejoratively suggests on page 18 that anything much better accomplished by bargaining of unrelated parties would have been "exacted" (a "handsome price" might have been "exacted") (Pet. App. 24a). This is unfair argumentation, tending to stigmatize a person who only wants a fair share, as an extortionist, twisting the matter around as Christiana's shareholders gets more marketable shares, shares which if prudently handled might be considered to be the equivalent of cash, or, at least, cash less market impact they create, involved in the increase of the floating supply or their own sales. A figure some where less than a 30% increase in its investment values, say 20%, would certainly not be extortion or exaction. Christiana, at present, receives taxable dividends on 1.15 shares of DuPont for each Christiana share outstanding, and after deducting its cost of administration .3% and Federal dividend taxes 7.2% it distributes to its shareholders approximately 107%.

While it might be argued that the market price of an operating company stock reflects a direct evaluation of a variety of operating factors, it can also be said that all of these operating factors of portfolio companies plus a congenital market discount with respect to closed-end funds is just as must an evaluation of the investment company. With respect to evaluation of an investment company's shares, certainly, in any other merger with a manufacturing company, other than DuPont, the valuation of Christiana shares, for example, would be taken into account, and the fact that DuPont is not even to be allowed to take into account the actual value of Christiana shares is solely a function of Christiana's control of DuPont and its ability to generate in DuPont's negotiators a will to rule out any factoring in of Christiana's market value. The discount at which the closed-end funds sold with reference to asset value is set forth in the Appendix to the Opinion (Pet. App. 102a).

In the face of these figures, for the Commission to say that the value of a closed-end investment company is the market price of its portfolio shares (Pet. App. 32a) is beyond comprehension. It is purely fiction, but the fiction is made real life in this case because Christiana is the dominant party in this situation and has the power to turn fiction into real life.

To deviate from these facts-of-life considerations and to impose a rigid rule that net asset value has to be the basis of a merger involving shares of a closed-end investment company is to go beyond reasonableness in interpreting a statute which requires all of the factors stated in Section 17(b)(1) to be taken into account. The Opinion does not make a narrow interpretation of the facts in this particular case based on the 98% holding of DuPont. It is general in character and principled on net asset value. It is not based on facts at all, and it finds no redeeming feature so far as DuPont is concerned other than the increase in DuPont's shareholders' net income per share by about 4¢ out of $7.33. It even implies that this is a harsh result since it states that anything greater would be harsher (Pet. App. 23a).

Tax Factors Are Not the Reason for Christiana's Market Price Being So Far Below Net Asset Value.

Both petitions isolate and identify tax factors as "the primary reason" Christiana shares have sold at such a large discount from net asset value (SEC Brief, p. 7; D-C, p. 6). Subsidiarily, the Briefs respectively mention "a relatively limited" and "a comparatively thin" market.

An obvious tax factor is the Federal inter-corporate tax on dividends which reduces the amount of the dividends received by Christiana which Christiana cannot distribute to its shareholders by 7.2%. Attributing any part of the discount to this circumstance is difficult to justify. Christiana shares were selling at over $20 less than a DuPont share, though Christiana held 1.15 of DuPont for each of its outstanding shares. If anything, Christiana should have been selling on an income basis about

7% above the price of DuPont. The Commission's Opinion recognizes this (Pet. App. 12, 23a, f. 44). A person, in other words, could purchase 7% more income on a share of Christiana than he would get from purchasing DuPont for a $20 greater investment. The percent yield per market price was much more favorable on Christiana.

The second tax related reason stated is Christiana's extremely low, relatively negligible, tax basis in the DuPont shares it holds. This is not an acceptable reason, because if Christiana were to sell its shares, it would wipe out approximately 30% of its net asset value, not to mention the collapse of the market for the rest of its shares because of market impact. The Opinion recognizes this fully in stating that this tax circumstance would inhibit any sale of DuPont shares by Christiana (Pet. App. 14a). So it couldn't be that this highly unlikely possibility had the slightest bearing on Christiana's market price. Furthermore, in Applicants' Exhibit B (A. A633), the Kidder Peabody Report states that, "As contrasted with the ordinary diversified investment company which also customarily sells at a discount, the consideration of possible taxes on gains or losses arising from sales of securities would appear to be of less significance in the case of Christiana since it has not engaged in sales of portfolio holdings."

The fact of the matter, as the Commission's Opinion notes, is that "Christiana, like most closed-end investment company issues, has long tended to sell at a discount from net asset or liquidation value" (Pet. App. 5a). The Court Opinion (Pet. App. 86a and 87a), in recognizing the factor of the intercorporate dividend tax and unrealized capital gain tax as merely "affecting", not explaining, the market price of Christiana's merely, stated that this was not a reason to ignore Christiana's market value. In Footnote 36 (Pet. App. 87a), the Court affirms the Commission's statement, above quoted, as to the endemic nature of the closed-end discount from the net asset value of closed-end funds' portfolios. It cites, among other authorities,

"*Discounts and Premiums on Closed-End Mutual Funds; a Study in Valuation*" by Kenneth J. Boudreaux (May, 1973, 28 Journal of Finance 515-522). That author states categorically, "the market price of a closed-end fund can fairly confidently be considered to represent the best estimate of the funds true value at each point in time" (p. 521). A thorough reading of the Boudreaux article does not disclose that the author assigns the reason for *any* part of the closed-end funds market discounts from net asset values to tax considerations.

In a recent issue of "Business Week" (June 28, 1976), at page 86, there is an article about a proposal to establish regular payouts from closed-end mutual funds, invading principal if necessary, in an attempt to encourage investors who at present rely on just the income of the funds. There was some difference of opinion in the mutual fund industry as to such a proposal. The article says:

> "But the doubters are watching closely to see whether the prospect of large, regular distributions will reduce the large discounts from net asset value at which almost all closed-end funds usually sell.
>
> Nobody really knows why these funds do sell at such substantial discounts. For example, the $640 million Tri-Continental Corp. and $470 million Lehman Corp., the two largest, are both trading at the moment on the New York Stock Exchange at around 26% below net asset value.* The Assn. of Closed-End Investment Companies has funded a study at the Wharton School of the University of Pennsylvania to discover the reasons, but advance reports suggest it may be inconclusive."

The testimony of Charles Townsend of Morgan Stanley to the same effect is set forth in the Court's Opinion (Pet. App. 57a, f. 14). Edward Townsend of the First Corporation was even more emphatic (A. A366) that the net asset value of Christiana shares was no index of its value, but that Christiana's price was its value. Later he reiterated that Christiana share-

* This is not a "thin" or "limited" market.

holders were not holding DuPont shares underpriced and that Christiana shares were not underpriced (A. A369). Even Mr. Shapiro testified to the same effect (A. A495).

This Respondent agrees with the *Harvard Law Review Case Comment* (page 54, *infra*), that sharing the tax benefit is justifiable since it cannot be accomplished without DuPont's cooperation, and, absent Christiana's control, that it would obviously be shared, probably equally. The argument for a sharing in the benefits of this "consensual" transaction however, has another facet. In fact, it implies in one sense that Christiana shareholders, while reaching for the near half billion dollar benefit for the exclusive enjoyment of its shareholders, will fall short to the extent that the market is depressed by the increase of nearly 40% in the floating supply of DuPont shares above the 34,000,000 of DuPont shares now floating. Christiana shareholders will be richly rewarded in principal and income increment, and tax benefits in any event despite market impact but there will be no compensating features to the detriment suffered by the other DuPont shareholders. Christiana shareholders will get the theoretical increment of close to a half billion dollars minus the market detriment from the increase in the floating supply brought to market. DuPont shareholders who sell will get their pre-merger price minus the currently effective market detriment. Allowing for this is not sharing at all. It is only an adjustment to preserve the status of DuPont shareholders relative to the floating supply before the merger, the barest requirement of justice and fairness, when DuPont and its shareholders must consent.

V.

A NUMBER OF RELEVANT FACTORS SHOULD BE CONSIDERED.

(a) *Possibly this is the most incremental and synergistic merger in history.*

There is no essential difference between this merger and other mergers generally. Other mergers may involve (or hopefully, involve) sharing facilities, gaining greater financial strength, decreasing overhead, obtaining a new line of products, or other considerations, *ad infinitum*. The hoped for results are frequently called synergism, which results for example when a unit valued at 100 is combined with a unit valued at 75 and the combination is envisaged as being worth 200. The 25 points extra are the synergism or hoped-for increment to be derived from the merger. Here, by reason of the merger, there is a theoretical increment in the proportion of the ratios of the above-stated example. The 25-point increment amounts to about half a billion dollars. This compares favorably with the total increment of any merger in history, and it is made possible only by DuPont's cooperation. Furthermore, it is not a virtue, as contended in the D-C Brief (page 23), but a vice of this transaction, that there is no disadvantage for DuPont in the transaction (assuming this is so) but actually an advantage in the pitiful privilege of obtaining an increase of 3 cents a share per book in earnings as compared with total earnings per share of $7.33.

Entirely apart from the $42.00 per share mark-up which Christiana shareholders would receive if they do not sell in such quantities as to depress the price for themselves (and everyone else) is the increased marketability of these shares especially for those holding the 90% of Christiana shares with over 5,000 shares (A. A512) and an average of 75,000 shares each (see page 7 *supra*). Most of these people are insiders with respect

to Christiana shares and so would be limited under SEC Rule 144, 17 CFR § 230, 144 to selling no more than 2,000 or so shares of Christiana every half year, and their potentiality in this respect when they receive DuPont shares, which will be similarly restricted, will be increased so that they can expect to be able to sell fifty to sixty thousand shares every six months (A. A429). This tremendous increase in marketability, which must be allotted to Christiana shareholders, is an increment of the merger itself worth the entire market price increment, giving Christiana shareholders a double dip. Tax freeness is a triple dip.

To state as a proposition that DuPont should be content because it suffers no harm was rightfully rejected by the Court, although the Court did state that it should be taken into account as a factor (Pet. App. 72a, f. 22). The Commission's opinion, of course, also considers that this is all DuPont shareholders are entitled to expect (Pet. App. 28a).

(b) *The right to share in tax savings of one party to a merger has recently been strongly supported.*

The right of DuPont's shareholders in a consensual transaction, which produces hundreds of millions of dollars of increment for Christiana shareholders to take into account that neither Christiana or its shareholders had any other means than a merger of achieving the results of converting Christiana shares into DuPont shares is strongly supported in a Case Comment in the December, 1976, issue of the *Harvard Law Review, Fairness Standard for SEC Approval of Mergers: Collins* v. *SEC*, Vol. 90, pp. 453-462. It singles out for special treatment the fact that "the court rejected Christiana's argument that those benefits were created by its own tax position and thus belonged to it" (p. 456). The Case Comment agrees with the Court's rejection on this and other general grounds and approves the Opinion. The Comment focuses on the benefit to Christiana and its shareholders of avoiding unfavorable tax consequences.

It follows the opinion of the court which picked up the testimony of Mr. Grimes, a DuPont witness (A. A446) in which he estimated that the taxes which might result to Christiana shareholders, were a one month liquidation under Sec. 333 of the Internal Revenue Code carried out, could be 200 to 400 million dollars depending on the definition of Christiana "earnings and profits," a specialized computation.

The report of Christiana's counsel forwarded to the financial advisors on July 8, 1972 (A. A877) enclosed a letter to Christiana's negotiators dated July 5, 1972 (A. A878) stating that a Section 333 liquidation "cannot be considered as a viable merger to the proposed merger. The letter also said "if all the legal questions discussed were resolved against Christiana the result would be an earnings and profits figure *vastly in excess* of 85.8 million." (Emphasis supplied.)

The Court's opinion, and the Harvard Law Review Comment which, of course, follows the opinion, may perhaps give undue emphasis to Mr. Grimes' figures. The *"vastly in excess"* estimate in Christiana counsel's letter certainly suggest a very great tax impact indeed, which may well include Mr. Grimes' figures, but this is all immaterial in any event because DuPont's liquidation under Section 333 was out of the question for the tax reasons stated. It had served its purpose as a method of getting the financial advisors to forget the market discount from net asset value (A. A849-50). See also Shapiro cross-examination on this aspect (A. A501-2).

There still remains a straight liquidation possibility under Delaware law which would not require duPont or DuPont shareholders' consent. This, of course, would involve Christiana shareholders in a capital gain situation. The 2.9 million shareholders who had a zero basis (Pet. App. 88a) would have a gain of $189 apiece, which at a 35% rate (including the preference tax for large shareholders) would be close to a half billion dollar taxes, with probably over a billion dollars in taxes to all shareholders. Needless to say, a liquidation would never be

approved by the shareholders. The conclusions of the Case Comment in the Harvard Law Review are even more persuasive in the light of this much higher tax consequence than the $400 million referred to in the article.*

(c) *Misuses of "value" in various contexts colors this case.*

The mesmerization which goes on by the segregation of the word "value" from the term, "net asset value" and by ornamentation of the segregated word "value" with decorative adjectives such as "intrinsic" or "fair", or most commonly "market", and which equalizes all the terms is unreasonable, especially when it is understood that net asset value really is only a technical term to describe the market price of a round lot of a traded stock security multiplied by the number of shares outstanding, the market price being only the function of the interaction of supply and demand with respect to a few round lot shares of traded stock at any particular time.

This matter was rather completely gone into at the cross-examination of Mr. Shapiro (A489-A496) to which the Respondent respectfully directs this court. The use of "net asset value" is a term of art, the use of market value in its stead is a misuse (if not a misrepresentation) when conclusions are suggested that can only be validated by depending on the difference between net asset value, and market value.

(d) *An important article on the valuation of freely-traded shares sheds light on this matter.*

In the D-C Petitioner's Brief in Appendix B-2 there is a reference to a pending suit for a refund of Federal income tax.

* In the *Watts* article, discussed next in this Section, the author stated the matter quite precisely (p. 63): "The process of determining value by use of actual sales prices may be precise in method, but the fact remains that sales figures precisely identify realizable amounts only for sales of limited amounts of securities at a particular moment in time, which time may not correspond at all with the access of the taxpayer to the market as a practical matter."

The Complaint in this suit was introduced as Murtaugh Exhibit 7 not printed), but relevant portions of it are found in printed Exhibit B to Murtaugh's "Request for Hearing and Advice" dated October 25, 1972 (A. A129, A144). The refund suit was predicated on an alleged error of the District Director of Internal Revenue in valuing distributions of 2¼%, 1⅔% and 2⅓% of the outstanding General Motors stock to Christiana in 1962, 1964 and 1965 at the market price of General Motors shares. The distributions were its share of the Du Pont divestiture. The firm of Dewey, Ballantine, Bushby, Palmer & Wood were counsel in the refund suit. (Murtaugh Exhibit 9, not printed.) That firm had also represented Christiana in the divestiture suit (177 F. Supp. 1).The principal attorney in the tax refund matter (disposed of by settlement about 18 months ago) was David E. Watts of the Dewey firm. He has written an exemplary article entitled, *"The Fair Market Value of Actively Traded Securities"* in the Fall, 1976, issue of *"The Tax Lawyer," (A. B. A.) Volume 30, at pages 51-84.* The very title challenges the contention that market price is an exclusive index of value as applied to the vast Christiana holdings of DuPont or even the four, five and six figure holdings of Christiana shareholders holding over 90% of Christiana's shares about to be converted into DuPont. Elsewhere, we will refer to this article as *Watts.* References pertinent to the issues in this case are found on pages 53, 54, 61, 62, 63, 65, 66, 68, 69, 72, 73, 74, 75 (including f. 42), 76, 77, 78, 79, 80, 81, 82, 83 and 84. It is no answer to dismiss the blockage cases as irrelevant here. Blockage implies a diminished price because of a volume of shares, whether or not there is a sale (*Watts,* 69). It allows for price depressing effects despite a prolonged and thoughtful period of marketing, including by secondaries (*Watts,* 74).

Since blockage is a mirror of market impact considerations, the cases on blockage bear on the matter of market impact in this case. When added selling of new DuPont shares equals the

amount for which a blockage allowance would be afforded to a large beneficiary of shares (even if there was no sale) this is an implicit recognition that amount of actual sales will have market impact equivalent to the blockage discount and, unfortunately, on all holders.*

The case of *Henry F. DuPont* v. *Commissioner* (1943), 2 Tax Court 246, involved a gift of 52,900 shares of DuPont, which was 4.8% of the then-outstanding DuPont shares. The Court considered, among other things, a table showing the total shares traded in 1938 (826,000). This was to demonstrate that the 52,900 shares relative to the market would depress all shares if sold. The government contended for quoted market price. The Tax Court concluded that the valuation of each share of stock should be $135.00—$18.00 or 13% below the market price. This is equivalent to a determination that that is what the market impact of these shares would be if sold (with some allowance for underwriting expense).

Blockage and Restrictions.

The Watts article (*supra,* at p. 79) deals with the subject of restrictions which the author states is an important factor in determining the fair market value of freely traded shares. The Commission's Opinion deals with this in an extended footnote (Pet. App. 21a f.43) and refers to Investment Company Act Release No. 5847 which deals with the impropriety of valuing restricted shares at market value "except for most unusual situations" which the Commission found this to be. Its reasoning in this last respect is not impressive as it is built upon a foundation restricting the valuation question to abuses in connection with

* The parameters of an author dealing with blockage do not go beyond a reasonable period after a single date so that for example he is not interested in when the ultimate effect of a big secondary will be absolutely dissipated so that there is no blockage effect. (See A. A892-893) The principles of blockage involving market depression are applicable where there are substantial secondary issues, and, as has been argued, by repetitive issues with cumulative effects.

investment letter stock. This narrow reading of the restriction price reduction concept is rebutted by the considerable authorities cited in Watts, *supra,* p. 82 under the subheading "Valuations reflecting restrictions" and at p. 84, "Valuations reflecting both blockage and restrictions" which refer to only a few investment letter situations and these without differentiation. The last paragraph of the Commission's footnote 43 (appearing at Pet. App. 22a and 23a) wherein the opinion refers to the fact that "(. . . most) of the DuPont stock to be received by Christiana stockholders will itself be restricted under the Securities Act so that it would be impermissible to take the restriction on Christiana's DuPont stock into account." As the Watts Article citation authorities show Christiana's DuPont shares restrictions would cause its new DuPont shares to be valued at or around Christiana's prior market value, and granted, for the sake of argument, that Christiana's shareholders are indirect owners of Christiana's DuPont shares, they are owners, *cum onere,* of such shares with the value reduction incidental to the restriction. Furthermore, obviously the same persons who are restricted post-merger with respect to DuPont shares were similarly restricted with respect to their Christiana shares and were limited by Rule 144—17 Ch. 11 CFR § 230, 144—from selling in a half year more than an average weekly number of shares sold in the preceding 4 weeks. With the limited market for Christiana shares, large shareholders could have sold a truly significant amount of Christiana shares over a 6 month period—something between 1,000 and 3,000 shares, but with the same restriction, as holders of DuPont post-merger, these shareholders could sell 50,000 to 60,000 shares in a 6 month period (A. A429).

In the Christiana refund suit Murtaugh Exhibit 7, not printed, it is claimed that in addition to the blockage discount called into play by the fact that Christiana received 2⅓%, 11⅔% and 2⅓% of General Motors in 1962, 1964 and 1965 respectively, calling for a 8% to 14% discount the claim is also made that in addition to the blockage discount Christiana was entitled to an

added discount because of restrictions imposed by the final divestiture decree. In the printed appendix as Exhibit B to this Respondent's Request for Hearing and Advice at (A. A144-7) it recites its claim as to the blockage factor "without taking into account the impairment in value resulting from the restrictions placed on such stock by the judgment." The additional paragraphs in the Complaint which specifically claimed an additional discount because of the restrictions was not included by this Respondent in his Request but enough is there to show that other paragraphs, which can be found in unprinted Murtaugh Exhibit 7, did make a claim for a price reduction based not only on blockage but on the restriction.

(e) *The Commission's evaluation of dispersion as valueless is on solid ground.*

The Commission's finding of no benefit from an effective dispersion of Christiana's DuPont shares (Pet. App. 19a) is more realistic than the Court's. The Commission's Opinion, in an area in which it certainly has sophistication and expertise, rejected the argument that DuPont would be better off were DuPont's managers freed from effective stockholder supervision, which Christiana, if the occasion required, could easily supply, and would supply in its own interest and the interest of all DuPont shareholders (Pet. App. 19a). This is consistent with the Commission's published views in its report *"Public Policy Implications of Investment Company Growth,"* H. R. 2337, 89th Congress, Second Session, 310-11 (1966). In a chapter of this report are comments on the "significant" benefit scattered shareholders may derive from the monitoring that investment companies, in their own interests, impose on management (a benefit to be lost here). Moreover, the notion that scattered shareholders can effectively protect their own interests as against the interests of management is vestigial. For effective protection, some sort of extra-managerial, concentrated leadership is frequently needed. (See Paragraph 22 of Murtaugh's Supplemental Petition for Rehearing (A. A220) and the Exhibit attached at (A. A224-6). The Eighth Circuit Opinion, when it states that it disagrees with the Commission and believes effectively widespread dispersion would benefit DuPont and the public is not in accord with current estimation, as the Commission stated (Pet. App. 19a). The D-C Petition departing from its theme of Commission expertise applauds the Court's Opinion in this respect. Of course, the Court does agree with the Commission that effective dispersion would not be accomplished in view of the concentration of DuPont family members as the large holders of Christiana, who, by hypothesis, would not be sellers of newly-acquired shares (Pet. App. 85a). The Commission is much more capable of making an accurate characterization, and protecting the judgmental processes from being misled by unreal concepts of the potency of corporate democracy. See *"Fair Shares in Corporate Mergers and Takeovers," Brudney & Chirelstein (Dec. 1974) 88 Harvard Law Review,* subhead *"Ratification"* at pp. 299, *et seq.*, where SEC and other authorities are gathered as to the inadequacy of a stockholders approval requirement as a protective measure, even if there is full disclosure. Where, as here, we are dealing in a specially regulated sphere which prohibits transactions such as this and has specific mandates before exemptions are granted of taking into account the consideration paid and received and reasonableness and fairness and no overreaching, to thrust DuPont shareholders back into the corporate jungle the 1940 Act was intended to protect them from, and to dispense with any factoring in of a result that arm's-length bargaining would entail, is uncalled for. The SEC Petition concedes that an arm's-length bargaining result would have been a factor in an unregulated merger (SEC Petition, p. 31) if DuPont were similarly controlled by a company not within the statutory classification of an investment company.

(f) *This is not a liquidation nor an exchange of equivalents.*

The SEC brief utilizes, incessantly, the power of suggestion in an effort to turn the proposed merger into a liquidation. Its

first effort in this direction is found on page 7 where it is stated that "because of its tax disadvantages and the discount at which its shares sold, it was desirable that its stockholders become direct, instead of indirect, owners of DuPont stock."* The SEC brief at page 7 then states with a high degree of suggestion and substitution: "It therefore proposed *liquidation* of Christiana by means of a merger into DuPont." (Emphasis supplied.) A close reading of the letter of Christiana's President, DuPont (Pet. App. 47a, f. 5)* shows no suggestion of liquidation. The attempt to condition the consideration of this cause by referring to it as a liquidation is the outstanding characteristic of the SEC brief. The term is used on pages 7 (2), 10, 14, 15 (4), 16, 22, 23 (3), 24, 25, (2), 27, 28 (2) and 32. This is not a liquidation. It is a merger. A liquidation could be accomplished without DuPont's consent. The Commission's opinion in no way suggest this is a liquidation although stating: "The Christiana stockholders *could have* caused Christiana to be liquidated. They would then have become the direct owners of the DuPont shares now held by Christiana. Had they done so, the situation would have been essentially the same as that contemplated by this merger." (Pet. App. 23a-24a) Emphasis supplied.) The Commission went on to state that "a liquidation, *unlike* this merger, would have adverse tax consequences for Christiana stockholders," (Pet. App. 24a) (Emphasis supplied.)

The proposed merger is thus designed to *avoid* a liquidation because of the serious tax problems that a liquidation would engender for its stockholders. Nowhere in the opinion is it suggested that this is a liquidation by merger, or that it is a liquidation in any sense of the word.

---

* The SEC brief omits an additional disadvantage catalogued in the same sentence of the President of Christiana's letter suggesting a merger, which was "there are certain conditions that limit to some extent the marketability of Christiana common stock" (Pet. App. 48a, f. 5).

* Also a vice-president and director of DuPont, and a member of its executive committee.

At page 10, the SEC Brief states that the Commission viewed the proposed transaction as the "exchange of equivalents, referring to a sentence found at Pet. App. 9. The D-C petition on page 7 makes the same assertion based on the same reference. Both briefs lift the words "exchange of equivalents" out of context. The Commission's use of the term is in an early Section (VI) devoted to setting forth the essence of the D-C view of the matter before it, with which its Division of Investment Management Regulation agreed. This is obvious from the last of the three paragraphs of Section VI (Pet. App. 10a). There is nothing in Section VI of the opinion that is a finding or statement of the Commission's view. This is more obvious since the Section starts off with the statement "At first blush . . ." The style of the author of this Opinion lends itself to elliptical misquotation. If he had started Section VI as he closed it "(That) in essence is the view of the two companies involved" this correction of a distortion of the opinion would not be necessary. The antecedent of "That" in the third paragraph is obviously all the material referred to in the first two paragraphs. To make the matter clearer, the next section of the Opinion (VII) (Pet. App. 10a) sets up the contentions of the Objectors.

(g) *Harmless error, if any, was involved in Dean Upson's appointment.*

Assuming that this Court feels that there was error in appointing Dean Upson, it must be because of a disagreement with the Commission decision that, as a matter of law, net asset value considerations are so controlling as to eliminate all other considerations. Our opponents apparently contend that this is what the Eighth Circuit Court should have done. However, they never made a motion either at the time of the oral argument or thereafter, when they advised the Court it couldn't appoint a special master, nor after they received word of Dean Upson's appointment as a contract consultant, nor even, after the filing of the

---

* The dissenting Judge apparently consented to the appointment and cast no aspersions in his dissenting opinion.

Report nor after the Opinion of the Court. This was open to them under the plain terms of Section 43 of the 1940 Act, and if their Motion was denied, the error, if any, in the appointment would have been preserved for review here. The petitioners elected to appeal rather than to seek a ruling from the Commission based on evidence. So far as Christiana is concerned, it really had nothing to lose because any setback is not irretrievable and the status quo is what they have lived with for 60 years. The risk-reward factor was in the petitioners' favor, virtually no risk, and merely reward deferred. The half-billion dollar tax-free windfall with the transfer of Christiana's control to management and with the luggage of an obsequious registration agreement was obviously preferable to a return to the agency with a direction to consider the matter covered by the Upson report, assuming net asset value was not absolutely controlling. As the Commission said of its original Opinion in the Order Denying Rehearing, "That holding does not turn on evidentiary details. It rests on our reading of the Act. Hence, additional evidence cannot alter the result." (Pet. App. 42a.) Moreover, it is clear that if net asset value is not controlling there is no use remanding this executed merger agreement for further consideration, because for no other reason could the "striking disparity" be justified. This is not a case in which the Commission has alternatives such as in a rate case or a reorganization case. The parties have made their choices, executed an agreement and the only question is, can *this* particular agreement to merge be deemed to qualify for an exemption under Section 17(b), of the 1940 Act?

(h) *Harriman* v. *DuPont discussion.*

There is a two-page discussion of the *Harriman* v. *DuPont* case (D. Del., 1975) 411 F. Supp. 133, in Appendix A6 and 7 to this Respondent's Brief in Opposition to Petitions of Writs of Certiorari. Each Court insisted its rulings were on different issues. The opinion below refers to it in footnote 18 (Pet. App. 66a) and footnote 23 (Pet. App. 72a). In the earlier footnote

the court below indicated its recognition that it did not have a rule 10(b)(5) issue before it, as the Harriman case did; in the latter footnote the Court refused to decide whether Delaware law was properly applied but said "we simply hold that the federal test of reasonableness and fairness has not been met here." In the opinion in the *Harriman* case in the last paragraph of footnote 38 (411 F. Supp. at 151) the Court noted the fact that the issues before that Court and the Eighth Circuit were separate and distinct. See also footnote 132 at 411 F. Supp. at page 159 where the Court in the *Harriman* case stated that the correctness of the issuance of the exemption was not before the Court but the question was presently before the Circuit Court of Appeals in the Eighth Circuit.

VI.

THIS CAUSE SHOULD NOT BE REMANDED UNLESS LACK OF PROOF OF MARKET IMPACT IS CRITICAL TO ITS DISPOSITION.

In *Ernst & Ernst* v. *Hochfelder* (1976), 96 S. Ct. 1375, 1391, this Court refused to remand for a trial under a standard other than negligence since the Plaintiff had specifically disclaimed fraud or intentional misconduct as a basis for liability. So, too, in this case, inasmuch as the Commission's Opinion relies upon the construction of the statute as legally requiring net asset value to control in a merger of an investment company and a controlled affiliate, if that is not the law, then there are no redeeming features, as the Commission has pointed out, to offset the fact that the transaction is in no other way sustainable, and so a remand, too, would be inappropriate.

The "striking disparity" of benefit which the Commission found indicates not a remand to the Commission but to the drawing boards of the companies to construct a less vulnerable deal. Contrary to the usual fate of the losing side in extended litigation, the happy ending is that no harm has been done, merely the *status quo* preserved.

If market impact is a factor to be given some value, this merely reinforces the futility of remandment for any addition to the disparity would obviously break the camel's back if not broken already by the "striking disparity" (Pet. App. 35a) of benefits. If market impact would be a factor, if more evidence was in the record, then this Court should remand for the Petitioner did everything possible to be ready, protested a program of consecutive hearings beginning February 5, 1973 unless his motion for a continuance at the end of the hearing was left pending, and, in the alternative, requested a continuance of the hearing (A. A227) and received the ruling of the Administrative Law Judge that his participation in the hearing would not be a waiver of his standing request for a continuance at the end of the hearing (A. A227). This Respondent's motion for a continuance was discussed at the conclusion of the testimony and some outline of further material this Respondent wished to introduce as evidence was mentioned, as well as his motion for continuance, pending since the start of the litigation (A. A612). The Judge took up the request for continuance and denied it (A. A614-615), just before the end of the session. When the Opinion of the Commission was rendered, this Respondent filed within allowed time his Supplemental Petition for Rehearing, including a Motion for Leave to Adduce Additional Evidence (A. A204-223). This was denied in the Memorandum Opinion and Order Denying Rehearing and Leave to Adduce Additional Evidence, which was the subject of a separate Petition to Review to the Circuit Court of Appeals and which is before this Court, along with this Respondent's Petition to Review the original order.

If the matter is so hairline that only greater and more specific proof of the probability of market impact can justify the finding that the 2½% discount will not stand up under the standards of Section 17(b)(1), then it is submitted that the proper course is to remand to the Eighth Circuit with whatever instruction this Court chooses to give on this subject for the purpose of remanding to the Commission to take further evidence.

It is respectfully submitted, however, that the proof of actual market impact probability would be merely cumulative, even though the Commission viewed it as the crux of the case (Pet. App. 25a) though ultimately finding it not cognizable or relevant.

VII.

THIS MERGER CANNOT BE SUSTAINED ON EVIDENTIARY GROUNDS BUT A REJECTION OF IT CAN BE.

The D-C petition at page 26 attempts to show that the evidence before the Commission established the earmarks of an arm's-length bargain. This is an attempt to sustain an agency decision on a basis that was not relied on by the agency. There are many cases in this court, and elsewhere, that hold that this cannot be done. *Investment Company Institute* v. *Camp* (1971), 401 U. S. 617, 627-8. As the Supreme Court said recently in *Federal Power Commission* v. *Texaco Inc.* (1974), 417 U. S. 380, 397:

> Had the order unambiguously provided what the Commission now asserts it was intended to provide, we would have a far different case to decide. But as it is, we cannot 'accept appellate counsel's *post hoc* rationalizations for agency action'; for an agency's order must be upheld, if at all, "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines,* 371 U.S. at 168-169; *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

Presumably the learned counsel are quite aware of this but are attempting to persuade the Court that it should overlook the principles set forth in the cases just cited and sustain the decision of the Commission on grounds which the Commission did not adopt. It certainly could have improved the legal position of the Petitioners had the Commission accepted the facts set forth in the D-C Petition (page 26, footnote 18). A fair inference is that the Commission did not believe the facts in the record would warrent an exemption on the basis of evidence but that the "incommensurate," "striking disparities" in benefits

could only be justified by the legal ruling it made. This being the case, as this Respondent strongly argues, there is no Occasion for a remand. The Opinion of the Court below (Pet. App. 77a, Footnote 29) noted that "The Commission skirted the objectivity issue by holding that as the issues presented were essentially legal in nature, they could not be resolved by reference to the opinion of financial experts." The Commission staff had harsh words to say about the lack of independence of the financial advisors as is set forth in the Court's Opinion (at Pet. App. 76a, Footnote 28) which the Court stated was, in its judgment, supported by the record as a whole.

This brings up an intriguing consideration in connection with fairness under the 1940 Act. If a merger ratio purports to be based upon an independent examination by financial analysts who were being advised that there was a limit imposed upon the ratio by an alternative, which in fact never existed and was never believed in by DuPont's negotiators, and if this was intention involving *scienter* would a merger be vulnerable if the ratio might otherwise within the range of fairness and, of course, was approved by the shareholders who are only tools in the hands of a management anxious to seize power and in the hands of a controlling shareholder anxious to reap half a billion dollars tax-free for its shareholders and some increase in income and an enormous increase in marketability. Is a transaction rendered unfair if purportedly independent financial advisors are directed to be governed by false considerations? In the case of *Harriman* v. *DuPont* (D. Del. 1975, 411 F. Supp. 133), cited throughout the D-C Brief, the judge found that (p. 144)

> "The range of merger terms initially recommended by Morgan Stanley and Kidder Peabody was *heavily influenced* by the theoretical availability of a 'one-month: liquidation under Section 333 of the Internal Revenue Code, 26 U. S. C. § 333, as a supposedly viable alternative to the proposed merger for Christiana in which Christiana's shareholders could realize a return approximating a small discount from net asset value and thereby similarly eliminate

> much of the market value disparity attaching to Christiana common." (Emphasis supplied.)

The Court further found since the categorical assertion of a limited ratio was believed by DuPont to be "merely a tactical ploy" (p. 145) thus the fact that the financial advisors were loaded down by this consideration and further instructed by DuPont's counsel (A. A850) that they should proceed *"on the assumption that the 30-day liquidation provisions would operate to Christiana's benefit here, DuPont would be justified in giving little weight to the market value of Christiana in the merger negotiations,"* raised an issue as to adequacy of disclosure, if not fully disclosed in the upcoming proxy material.

This brings up the interesting question of whether the *scienter* of a misrepresentation to and consequent manipulation of the financial advisors rendered the merger ratio determination unfair. In the *Harriman* case the Judge refused to enter a final order, so no appeal has been possible, but instead rendered an interim decision pending a review of the future proxy statement (see page 166, footnote 165).

This portion of Respondent's Brief may go too far afield to be helpful to this Court's decision of the case, but at least may alert it to the necessary discriminating treatment that will not eliminate misrepresentation and deception as an element in deciding the issue of fairness under the 1940 Act, unless this Court decides to so rule.

VIII.

THE MERGER TERMS ARE PATENTLY NOT BALANCED AT ALL AND ARE UNFAIR ON THEIR FACE.

The above caption is responsive to the Commission's statement that the Act in Section 17(b)(1) does not require that "the benefits to the parties must be nicely balanced." (Pet. App. 20a).

Using pre-merger talk figures, this is what the Opinion and Order sanctions:

Christiana Shareholder Gets	Dupont Shareholder Gets
$41.25 in added *available* price of investment (close to half billion dollars)	$1.10 increase in equity per share (80 cents net) (Not an *available* sum to shareholders.)
7.2% increase in dividends.	3 cents increase in share of earnings. $7.34 vs. $7.31 per 1971 figures (Also not available)
Liquidity (Opportunity to cash in marketable shares.)	No increase in market value
¾ restricted allowed vastly expanded (30 times) liquidity privilege in auction market under Rule 144.	Loses:
Registration rights. (Not available to unaffiliated shareholders.)	Effect of Market Impact of added shares. Affects DuPont as a company as to shares issued in acquisition or in new financing, and also all stockholders who sell.
¼ free of restrictions for unaffiliated shareholders.	Surrendered responsibility of directors to be guided by DuPont's interests from time to time in regard to Registration.
Tax free liquidation result. (a billion avoided)	Management responsibility to shareholders interest underwritten by Christiana's centralized shareholder interest in DuPont's operation and possibility of DuPont shareholders being effectively protected from poor management.
Operating cost gone .3%	
Relinquishes:	
(Transfers)	
Voting Control	
DuPont Management Gets	
Control*	

* Except it surrenders control of registration.

CONCLUSION.

The decision of the Circuit Court of Appeals should be confirmed.

Respectfully submitted,

LEWIS C. MURTAUGH,
TIMOTHY J. MURTAUGH III,
MURTAUGH, NELSON & SWEET,
105 West Adams Street,
Chicago, Illinois 60603,
Attorneys for Lewis C. Murtaugh, Trustee for Emmanuel and Helen Steib, Under Declaration of Trust dated 8/30/56.

APPENDIX A.

In addition to the provisions of the Investment Company Act of 1940, 15 USCA 80a-17, which were set forth in Appendix A of the Brief of the Petitioners, DuPont and Christiana, the following sections of the Act are pertinent:

15 USC §§ 80a-1(a)(3)

> (a) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 79z—4 of this title, and facts otherwise disclosed and ascertained, it is found that investment companies are affected with a national public interest in that, among other things—
>
> (3) such companies customarily invest and trade in securities isued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce.

* * * * *

15 USC §§ 80a-17(d)

> (d) It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company (other than a company of the character described in section 80a—12(d) (3) (A) and (B) of this title), or any affiliated person of such a person or principal underwriter, acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant. Nothing contained in this subsection shall be deemed to preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

APPENDIX B.

Excerpt from DuPont Brief in *United States* v. *DuPont et al.* (1961), 366 U. S. 316, the last part of Murtaugh Exhibit 2 in the record of this case (not printed):

Under the plan, the trustee would have been required to sell each year, for ten years, approximately 2,000,000 shares of General Motors stock—the duPont shares allocable to Christiana, Delaware and the stockholders of Delaware, plus one-tenth of the General Motors stock owned by Christiana itself.[45] In addition, there would have been substantial selling by du Pont stockholders of the shares of General Motors that they received in the annual distributions to realize cash with which to pay the income taxes due. The depressing market effect of both of these types of sales would in turn have led to additional sales by those holders of the remaining 218,000,000 General Motors shares who would have been disinclined to retain a stock that was to be depressed in price well below its true market value for a decade. Again, the finding of the court below after an extensive review of the evidence that was adduced on these matters

45. Under the provisions of appellant's proposed judgment the trustee would have received 63,000,000 shares of General Motors stock from du Pont and 535,500 shares from Christiana. He would have distributed over a ten-year period 47,865,385 shares to du Pont stockholders other than Christiana, Delaware and the stockholders of Delaware. He would have sold over the same period for the account of these latter corporations 19,018,997 shares, and for the account of the stockholders of Delaware 651,188 shares, or a total of 19,670,115 shares. See du Pont Exh. 51, R. 3057; Chr. Exh. 4, p. 3, R. 3076.

Murtaugh's Supplement to Above Footnote.

The government's plan as detailed in Justice Frankfurter's dissenting opinion at page 342, had this additional facet: "If, in the trustee's judgment, 'reasonable market conditions' did not prevail during any given year, he was to be allowed to petition the Court for an extension of time within the ten year period."

(R. 3212-3234) was that the combined selling would have had a very serious depressing effect (R. 3247).

Even one of the annual sales by the trustee, approximating more than $80,000,000 (assuming a price for General Motors of something above $40 per share), would have been a major financial undertaking. Since 1936, there have been only ten rights offerings of industrial common stocks in excess of $80,000,000, and only four non-rights offerings of such stock in excess of $75,000,000. du Pont Exhs. 30, 32, R. 3035, 3038A.[46] An offering of $80,000,000 each year for ten years would have been a project unique in financial history. Lenz, R. 2066. See also Emerson, R. 1485, 1524-1525. Since an ample supply of General Motors stock is and has been freely available to investors who wish to buy it at the prevailing market price (R. 1518, 2108), the demand necessary to absorb each annual offering would have had to be created. That could have been done only by a decrease in the price below what it would have been had the 2,000,000 shares not been added to the supply side of the supply-demand equation. The repetition of such offerings annually for ten years, moreover, would have produced a market impact considerably larger than the impact of any single offering. On this the witnesses who had had wide experience in the marketing of securities were emphatic (Emerson, R. 1508; Lenz, R. 2066-2067; Forgan, R. 2237-2238). Appellant's witnesses were inclined to agree (Friend, R. 1030, 1036; Boulton, R. 537-538). Moreover, the continuous pressure on the price of the stock would have led sophisticated purchasers to defer purchases until it reached a very low level. The fact that substantial amounts of General Motors stock would have been distributed to many institutional investors as dividends on their du Pont stock would also have tended to decrease the demand by such investors for General Motors stock. Herd, R. 1838-1839.

46. Two of these four non-rights offerings in excess of $75,000,000 are reflected in exhibits not printed. du Pont Exh. 63; App. Exh. 679.

FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1870

E.I. DU PONT DE NEMOURS AND COMPANY, ET AL., *Petitioners,*

v.

RICHARD J. COLLINS, JR., ET AL., *Respondents.*

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION, *Petitioner,*

v.

RICHARD J. COLLINS, JR., ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS E. I. du PONT de NEMOURS AND COMPANY AND CHRISTIANA SECURITIES COMPANY

Of Counsel:

CHARLES E. WELCH
ROGER W. ARRINGTON
7038 Du Pont Building
Wilmington, Delaware 19898

DANIEL M. GRIBBON
CYRIL V. SMITH, JR.
JAMES M. McHANEY, JR.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner E.I. du Pont de Nemours and Company

MATTHEW J. BRODERICK
RICHARD S. SELTZER
EDWARD J. McINTYRE
Dechert Price & Rhoads
3400 Centre Square West
Philadelphia, Pa. 19102
Attorneys for Petitioner Christiana Securities Company

TABLE OF CONTENTS

Page

I. The Requirements of Section 17(b) 2

II. Sharing of Tax Benefits 7

III. Asserted Adverse Market Impact 11

Conclusion 16

TABLE OF AUTHORITIES

Cases:

Pepper v. *Litton*, 308 U.S. 295 (1939) 5

Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 (1947) 7, 15

Administrative Agencies:

Central States Elec. Corp., 30 S.E.C. 680 (1949) 3

Statutes:

Investment Company Act of 1940, 15 U.S.C. § 80a-1, *et seq.*:

Section 17, 15 U.S.C. § 80a-17 .....*passim*

Clayton Act § 7, 15 U.S.C. § 12 *et seq.* 13

Miscellaneous:

Brudney and Chirelstein, *Fair Shares in Corporate Mergers And Takeovers*, 88 Harv. L. Rev. 297 (1974) 6, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1870

E.I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Petitioners,

v.

RICHARD J. COLLINS, JR., ET AL., *Respondents.*

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION, *Petitioner,*

v.

RICHARD J. COLLINS, JR., ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS E. I. du PONT de NEMOURS AND COMPANY AND CHRISTIANA SECURITIES COMPANY

Respondents contend that the Commission's approval of the terms on which Du Pont and Christiana propose to merge should be set aside on essentially three grounds. (1) They read Section 17(b) of the Investment Company Act as requiring that the merger

terms reflect the market value of Christiana common stock and that there be a finding by the Commission that the terms carry the earmarks of an arm's length bargain. (2) They claim that fairness requires that the merger terms allocate to the stockholders of Du Pont a substantial portion of any benefits that accrue to the Christiana stockholders through the operation of the federal tax laws. (3) Respondent Murtaugh also asserts that the Commission should have disapproved the merger because of his apprehension that the merger would cause such selling as to have an adverse impact on the market price of Du Pont stock.

Section 17(b) does not impose the requirements perceived by respondents, and there is no valid basis for rejecting the Commission's informed reasoned judgment as to sharing of tax benefits and alleged market impact.

I. THE REQUIREMENTS OF SECTION 17(b)

The emphasis that respondents and the Court of Appeals place upon the market value of the common stock of Christiana reflects a misconception of the proposed merger. Du Pont is not acquiring the common stock of Christiana which, as Respondent Murtaugh recognizes, is "but an aliquot share in a huge block of Du Pont stock with many impediments and barnacles on it" (Br. 45). It is those very impediments and barnacles that result in the common stock of Christiana selling at a discount from the value of the Du Pont stock that Christiana owns. What Du Pont is acquiring in the merger is some 13.4 million shares of its own stock, totally free of the impediments and barnacles that encrust the common stock of Christiana.

The Commission did not overlook the market value of the Christiana common stock. Indeed, one of the five issues it set down for hearing was "whether the terms of the proposed transactions reflect a disproportionate weight given to either the market value or the net asset value of Christiana securities" (A. 36). The Commission determined that in this case, where over 98 percent of Christiana's assets consist of Du Pont common stock, the proper measure of Christiana's contribution to the merger is the value of that stock. The market price of Christiana stock is so importantly influenced by "impediments and barnacles" that will disappear in the merger that it provides no help in valuing Christiana's contribution to the merger.

The relevant statute, Section 17(b) of the Investment Company Act, delegates to the Commission broad responsibility for determining fairness, reasonableness and the absence of overreaching in transactions involving investment companies. Since the early days of the Investment Company Act the Commission has viewed net asset value as the "primary measure of value of an investment company." *Central States Elec. Corp.*, 30 S.E.C. 680, 700 (1949). Here it applied that principle, holding that an investment company "can normally be presumed to be worth its net asset value." (Pet. App. 32a). Since the merger terms called for the "exchange of equivalents" (Pet. App. 9a)[1]—Du Pont will receive some 13.4 million

[1] Murtaugh's argument that the Commission did not so find but was merely characterizing the applicants' contention is wholly unconvincing (Br. 63). The statement itself is not so qualified; it is the Commission's own description of the transaction. Moreover, the entire opinion discloses that the Commission so understood the transaction. Collins acknowledges that the Commission so found (Br. 14).

shares of its own stock for cancellation and will issue in exchange some 13.2 million shares of the same stock —there was no need to look beyond the value of that stock. If Du Pont were giving cash, notes or shares of another company in exchange for Christiana's assets, there might be a valuation problem. Market value, earnings, dividends, book value, growth prospects are all approximations that must of necessity be used in appraising fairness where unlikes are being exchanged, as the Commission recognized (Pet. App. 31a-32a). Neither law nor logic, however, demands that the parties' contributions to this merger—an approximately equal number of shares of Du Pont common stock on both sides—be measured by anything other than the market value of those shares.[2]

The foregoing is not to say that there may not be factors extraneous to the proposed exchange of Du Pont stock for Du Pont stock that the Commission might take into account in determining the fairness of the proposed terms. The Commission gave full consideration to the factors advanced by the respondents —the benefits flowing to the Christiana stockholders and the claim that the merger would engender sales that would have an adverse impact on the market value of Du Pont stock. No resolution of these factors—whether that made by the Commission or advanced by respondents—would lead any support, however, to the contention that Section 17(b) requires that the market value of the Christiana stock be reflect-

[2] The Court of Appeals correctly perceived that the Act requires the Commission to "look to the value given and received by the respective shareholders to a merger" (Pet. App. 58a). It erred in failing to recognize that the value given by the Christiana shareholders should be measured by the 13.4 million shares of Du Pont stock surrendered for cancellation.

ed in merger terms that call for the exchange of an approximately equal number of shares of Du Pont stock.

Respondents' arms length contention wholly ignores the broad delegation of responsibility that Congress has made to the Commission with respect to transactions involving investment companies. In discharging that responsibility the Commission has not been instructed by Congress merely to ascertain whether the proposed transaction "carries the earmarks of an arm's length bargain." *Pepper* v. *Litton,* 308 U.S. at 306-07. The Commission's charter under the Investment Company Act is much more comprehensive. It must determine whether the proposed terms—regardless of the circumstances in which they are bargained —are reasonable and fair and do not involve overreaching on the part of any person concerned. The inquiry prescribed in *Pepper* v. *Litton* is an accepted procedure for detecting unfairness where a court is asked to pass upon a corporate transaction that has been privately bargained. Section 17(b), however, directs that the Commission's involvement be far deeper wherever investment companies are involved. A transaction within the scope of Section 17(b) is absolutely prohibited unless and until the Commission determines from all the evidence that the transaction meets the statutory criteria. As the Commission pointed out, in commenting on the evidence relating to the course of the merger negotiations, it can place no reliance upon such evidence, but must look solely to the results in ascertaining whether the terms are fair, reasonable, and free of overreaching (Pet. App. 35a, fn. 62).

There is no basis in the language of Section 17(b) or in the objective of that Section for suggesting, as

respondents do, that instead of, or in addition to, making the substantive determination specifically called for in Section 17(b) the Commission must also make inquiry as to whether the transaction carries the earmarks of an arm's length bargain. Such an inquiry is wholly redundant where the Commission must itself—wholly free of control or outside influence—determine fairness, reasonableness and the absence of overreaching before approving an otherwise prohibited transaction.

In the face of the findings the Commission has made, the suggestion that its determination is vitiated by the absence of a finding that the transaction carries the earmarks of an arm's length bargain approaches sophistry. The Commission is specifically directed by Section 17(b) to root out "overreaching on the part of any person concerned." Certainly its finding, after inquiry, that such overreaching is totally absent in this transaction affords at least as much—if not greater—protection to the stockholders of both companies than the "earmarks" inquiry that respondents demand. In addition, that inquiry, as is acknowledged by the law review article on which Murtaugh so heavily relies, is directed at determining whether the dominated company has suffered detriment. Brudney and Chirelstein, *Fair Shares in Corporate Mergers and Takeovers,* 88 Harv. L. Rev. 297, 309-312 (1974). The Commission made that inquiry and determined that, while significant benefits would flow to Christiana stockholders, the merger would inflict no "detriment on Du Pont or on its stockholders." (Pet. App. 23a, fn. 44). The Court of Appeals found no fault with that determination (Pet. App. 72a, fn. 22).

The Commission quite properly read Section 17(b) as imposing upon it an obligation to prevent either

Christiana or Du Pont from using a strategic position to effect a merger at other than fair value (Pet. App. 24a, 25a). In determining whether the proposed merger terms met the exacting standards of that section, the Commission declined to speculate as to the bargain that might have been arrived at by wholly unrelated parties free to exploit each other's strengths and weaknesses in a manner denied to those within the scope of Section 17(b).[3]

II. SHARING OF TAX BENEFITS

Both respondents contend that fairness requires that the stockholders of Du Pont be allocated a substantial share of the benefits that will accrue to the Christiana shareholders through the operation of the federal tax laws. Resolution of this contention calls for the exercise of an informed judgment based upon administrative experience and expertise. It has been fully considered by the Commission and it cannot be fairly urged that the Commission's determination to the contrary is arbitrary or irrational. That should be the end of the matter. *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 209 (1947).

The benefits flowing to the Christiana shareholders, which respondents claim must in fairness be diverted in substantial part to Du Pont, constitute no detriment whatsoever to Du Pont or its stockholders. They flow entirely from the operation of the tax laws as

---

[3] An arm's length bargain is not necessarily fair to all concerned. *Cf. Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947). There the Commission, acting under a "fair and equitable" standard, denied equal participation in a reorganization to certain persons who had purchased stock in good faith at arm's length in transactions that were totally free of "fraud or lack of disclosure." 332 U.S. at 197.

passed by Congress and enforced by the Internal Revenue Service. One benefit is that Christiana would no longer be required to pay the intercorporate dividend tax which, as a corporation, it has been paying. That is the only tax saving made possible by this merger. That saving could have been achieved through a liquidation of Christiana without Du Pont's cooperation and Du Pont stockholders could hardly have any valid claim on that saving on the ground that it was achieved through merger rather than liquidation.

In addition, Christiana stockholders will become direct owners of Du Pont stock. If direct ownership were to be accomplished through a liquidation, Christina stockholders would incur a gain or loss for tax purposes, depending upon their basis in Christiana stock, the value of Du Pont stock received upon liquidation, and their taxpaying status.[4] Such direct ownership can be accomplished through a merger without the imposition of any tax, however, because the tax laws view a merger as a change in the form of the stockholder's investment that does not give rise to tax consequences. Achieving direct ownership through merger does not, however, effect a tax savings but merely a tax deferral until such time as the Du Pont stock received in the merger is disposed of. The tax basis in Christiana stock of a Christiana stockholder will carry forward to the Du Pont stock received in the merger. Should a former Christiana stockholder elect to sell the Du Pont stock, a full capital gains tax would then be payable.

[4] Approximately 11 percent of the Christiana common stock is owned by tax-exempt institutions which would incur no tax upon receipt of Du Pont stock under any circumstances (A. 845).

The principal benefit, therefore, that respondents demand be shared with Du Pont stockholders is that accruing to the Christiana stockholders by reason of their direct ownership of the Du Pont shares that Christiana presently owns. Those shares will presumably have a higher market value than the burdened Christiana stock presently owned by a Christiana stockholder. While these benefits are made possible by the tax deferral that Congress has decreed in the case of mergers, they are not, as has been shown, tax savings. In substance the respondents are claiming that a transaction which has been held to be tax-free under the tax laws shall nonetheless be subjected to an exaction in lieu of a tax by operation of the Investment Company Act, and that the amount exacted be turned over not to the United States Treasury but to the stockholders of Du Pont.[5]

The Commission, quite properly, left the administration of the tax laws to the Internal Revenue Service. It concluded that the tax problems that Christiana faced in placing Du Pont stock in the hands of Christinana shareholders did not alter the inherent value of the Du Pont stock owned by Christiana. To have allocated to Du Pont any significant portion of the benefits flowing to the Christiana shareholders as the result of the tax deferral provided by Congress would, in the Commission's view, have divested such shareholders of "intrinsic investment values to which they are legally and equitably entitled" (Pet. App. 36a). Since protection of investment company shareholders

[5] The proposed merger is conditioned upon a determination by the Internal Revenue Service that the transaction will be tax-free to shareholders of Christiana, which determination has been made.

against dilution in the value of their assets is a prime purpose of the Investment Company Act, the Commission's determination, which implements this purpose, can hardly be adjudged arbitrary or irrational. The tax consequences of the proposed merger were matters to be resolved with the Internal Revenue Service, as the Commission viewed the matter; the stockholders of Du Pont "have no property interest in [those] tax problems" (Pet. App. 24a).

No judicial precedent, no provision of the Investment Company Act, no legislative history is cited by respondents for the proposition that Du Pont is required, as a matter of fairness, to share significantly in the benefits that accrue to the Christiana stockholders through operation of the tax laws. Murtaugh relies largely upon the views of Professors Brudney and Chirelstein, *supra*. Their proposal for sharing post-merger benefits, as they acknowledge, does not reflect existing law, but rests on their "reexamination" of the "existing standard of fairness." 88 Harv. L. Rev. at 313. It appears to be limited to situations in which there are discernible benefits to the surviving corporation and does not suggest that tax benefits achieved by individual stockholders should be shared with stockholders of the other party to the merger. Moreover, their effort is to develop an aid to courts in the application of general equitable principles to challenged mergers; they recognize as outside the scope of their effort those instances in which statutes vest specific authority in an agency to oversee merger terms. 88 Harv. L. Rev. at 298. Certainly Section 17(b) of the Investment Company Act is such a statute and the broad responsibility delegated to the Commission makes unnecessary resort to any general standard designed to serve in the absence of statutory control over merger terms.

The factors unique to investment companies, including their valuation on the basis of underlying assets, the overriding Congressional intent reflected in the Act that asset value be protected against dilution, and the Commission's long line of decisions in comparable mergers giving effect to those policies, are all independent grounds for the reasoned decision of the Commission in rejecting a sharing approach here. The record before the Commission, moreover, demonstrated that its long-established policy was reflected in the practices of the financial community.[6] Respondents would thus have the informed judgment of the Commission as to fairness rejected in favor of a notion of fairness that has no basis in the Act or financial practice.

III. ASSERTED ADVERSE MARKET IMPACT

Murtaugh alone contends that the merger terms are unfair because the merger would have an adverse impact on the market price of Du Pont stock.[7] The Com-

---

[6] An analysis of ten comparable mergers of investment companies with their operating affiliates showed that net asset value was the uniform basis for the merger terms, notwitstanding substantial benefits to the investment company party to the merger (A. 687-88). Of these mergers, six were subject to Commission approval under Section 17 and four, because the investment company was not required to be registered with the Commission, were not so subject.

[7] Collins has at no time supported this argument. His contention is that Christiana's ability to vote a large block of Du Pont stock has been a continuing detriment to the remainder of Du Pont's stockholders over the years because it has diluted their voting rights. Instead of welcoming the elimination of Christiana which the proposed merger would accomplish, however, Collins demands that a heavy price be exacted from the Christiana shareholders both as compensation for the alleged harm caused in

mission examined the evidence and the arguments in a reasoned analysis, and rejected the claim for these principal reasons.

First, it found that the argument rested on an invalid premise: an analogy to the predictions of market impact made in connection with proposed forced sales of stock in the Du Pont-General Motors divestiture case.

Second, it found no reason to believe that former Christiana stockholders would act in an irrational manner contrary to their own interests to drive down the price of Du Pont stock.

Third, it determined that such occasional short term market effects as it assumed might result from sales engendered by the merger could not properly be taken into account in determining the fairness of the merger terms.

The entire Murtaugh argument rests largely upon the consequences that follow when stockholders are precluded from acting in furtherance of their own best interests and are required to sell in circumstances in which they might otherwise choose not to sell. Thus he points principally to the apprehensions of adverse market impact expressed as to the divestiture order proposed by the Antitrust Division of the Department of Justice with respect to Du Pont's holdings of Gen-

---

the past and as a deterrent to others who might in the future contemplate the formation of a holding company (Br. pp. 10-14). Such an exaction as Collins deems fair would almost certainly defeat the merger. The record shows that Christiana was unwilling to accept any greater discount than that reflected in the merger terms (A. 562); the substantial interest in Christiana held by entities that pay no taxes would militate strongly against terms that deprived them of any significantly larger portion of their underlying investment.

eral Motors stock that were found by this Court to be in violation of Section 7 of the Clayton Act (Br. 35-36). That order, however, would have required, under penalty of contempt, sales of substantial volumes of General Motors stock in each year for a period of ten years. It would also have necessitated substantial additional sales by Du Pont stockholders to obtain funds to pay taxes—in cash—at ordinary income tax rates ranging up to 90 percent on the receipt of General Motors stock as dividends over the same ten year period.

As the Commission correctly observed, "the General Motors situation had nothing in common with this one" (Pet. App. 33a, fn. 59). There is no requirement, by court order or otherwise, that a single share of the Du Pont stock to be received by Christiana shareholders be sold, and the merger will be tax-free so there will be no necessity to sell stock to raise money to pay taxes. No Christiana shareholder will be under any compulsion to act at any time other than in his own self-interest.

The record discloses and the Commission found present here a series of considerations all of which strongly suggest that consummation of the merger will not give rise to significant sales of Du Pont stock. The stock is "generally regarded as an issue of prime investment quality"—which is not disputed by Murtaugh (Pet. App. 31a, fn. 55). The essential nature of the investment of former Christiana stockholders will remain Du Pont (Pet. App. 28a) with no need for reappraisal as is the case in most mergers. Most of the Christiana stock is held by long term investors (Pet. App. 32a). None of the directors of Christiana intends to sell or knows of any person with any intention of

selling (A. 565). The Wilmington Trust Company, which in various capacities holds over half of the Christiana stock, has no intention of selling except as may be required in connection with such matters as the settlement of estates (A. 436, 845). Much of the Christiana stock is held at a very low or zero tax basis as the result of the distribution of General Motors stock by Du Pont and Christiana, thus increasing the tax cost of any sale (Pet. App. 14a). About seventy-five percent of the Christiana stock is held by persons regarded as affiliates of Du Pont under the securities laws. Sales by such persons of any significant amounts of stock would have to be accomplished by registered secondary offerings, which the record shows can be and are made at times and in a manner to minimize any adverse market impact (A. 428-9). The heart of the matter is that there is no basis for believing that any Christiana stockholders would "rush off madly to dispose of valuable property for less than its intrinsic worth" (Pet. App. 25a, fn. 46).[8]

The Commission assumed that the merger might engender some selling which might at certain points in time be substantial (Pet. App. 26a). Without attempting, however, to predict the volume of such sales, it concluded that the market behavior of Du Pont stock would be governed by "economic realities and business fundamentals" (Pet. App. 27a). It correctly perceived that "[i]n no way will the Christiana merger detract from either the assets or earning power of

[8] Murtaugh's contention that the mere transfer of ownership of the Du Pont shares presently owned by Christiana to Christiana's 8,000 shareholders will cause a sharp decline in the market price of Du Pont stock (Br. 37) is sheer speculation. It is only the sale or offer to sell of any such shares that can begin to have any effect on market prices.

that business. The fundamentals of the situation will remain as they are." (Pet. App. 28a). For these reasons the Commission declined in the exercise of its informed judgment to permit "transitory market phenomena" to influence the terms of a "fundamental corporate readjustment" or to speculate "about the probable behavior patterns of speculators" (Pet. App. 27a, 30a).

Murtaugh offered no evidence that the merger would repeal the "realities" and "fundamentals" cited by the Commission, render Du Pont stock an undesirable investment in the hands of the present Christiana stockholders, or cause investors to act irrationally with respect to Du Pont stock. Certainly the Commission was amply warranted in determining on the basis of its own considerable experience and expertise that such selling of Du Pont stock as might be generated by the merger would cause no detriment to Du Pont stockholders that can properly be taken into account in assessing the fairness of the proposed merger terms (Pet. App. 26a).

The Murtaugh claim, calling as it does for a prediction of stock market behavior, is surely one to be resolved by the application of "administrative experience" and "appreciation of the complexities of the problem." The Commission's determination, therefore, that the claim lacks substance "rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts." It is the "type of judgment which administrative agencies are best equipped to make and which justifies use of the administrative process." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. at 209.

CONCLUSION

The Commission has made a reasoned determination that the terms of the proposed merger are fair and reasonable and do not reflect overreaching on the part of any person. That determination faithfully discharges the broad responsibility delegated to the Commission in Section 17(b) of the Investment Company Act and constitutes a wholly rational resolution of respondents' tax benefit sharing and market impact contentions. It should be affirmed and the decision of the Court of Appeals reversed.

Respectfully submitted,

Of Counsel

CHARLES E. WELCH
ROGER W. ARRINGTON
7038 Du Pont Building
Wilmington, Delaware
19898

DANIEL M. GRIBBON
CYRIL V. SMITH, JR.
JAMES M. MCHANEY, JR.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner
E.I. du Pont de Nemours and Company

MATTHEW J. BRODERICK
RICHARD S. SELTZER
EDWARD J. MCINTYRE
Dechert Price & Rhoads
3400 Centre Square West
Philadelphia, Pa. 19102

Attorneys for Petitioner
Christiana Securities Company

see

75

1872